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Supreme Court of the United States

October Term, 1969

No. ~~69C~~ 49

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,
Plaintiffs-Appellants,

v.

LOWELL WADMOND, *et al.*,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, *et al.*,
Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS WEXLER, ET AL.

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BRIEF FOR APPELLANTS WEXLER, ET AL.

Opinions Below

The opinion of District Judge Motley convening the three-judge statutory court is reported at 291 F. Supp. 772 and is reprinted in the appendix at A. 106.[1] The majority opinion of the three-judge statutory court is reported at 299

[1] The designation "A" refers to the Single Appendix.

F. Supp. 117 and is reprinted at A. 143, and the partially concurring and partially dissenting opinion of Judge Motley is reported at 299 F. Supp. 133 and is reprinted at A. 169.

Jurisdiction

The judgment of the three-judge district court below was made and entered on June 16, 1969 (A. 225). Notice of appeal from this judgment was filed with the Clerk of the Southern District of New York on August 8, 1969 (A. 229). The Jurisdictional Statement was filed on October 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

Statutes Involved

The constitutional validity of § 90(1)(a) of the New York Judiciary Law (hereinafter "Jud. L."), Art. 94, Rules 9401, 9404, 9406(1) of the New York Civil Practice Law and Rules (hereinafter "CPLR") and Rule VIII of the Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors-at-law contained in Jud. L. Appendix (hereinafter "Rule VIII") are here involved. The texts of these statutory provisions and of Rule VIII are fully set forth, *infra*, at 1a-4a.[2]

Questions Presented

Are applicants and prospective applicants to the New York Bar denied the freedom and privacy of their political and personal speech, beliefs, associations and activities, and is a class of their prospective clients, *i.e.*, litigants who

[2] Where general reference is made to these statutes and judicial rules, it will be by the term "statutes."

seek to redress deprivation of federal rights, denied adequate and effective assistance of counsel and free access to federal and state courts by Jud. L. § 90(1)(a), CPLR 9401, 9404 and 9406(1) and Rule VIII

(1) because they unreasonably predicate admission on an applicant's political background;

(2) because they establish a political screening program as a method of achieving New York's purpose despite the existence of alternative methods having a "less drastic" impact on First Amendment freedoms;

(3) because, on their face, they establish an impermissibly vague and overbroad political test for admission to the Bar;

(4) because they impose on every applicant for admission the burden of proving that (a) he believes in the form of government of the United States and (b) is loyal to such government;

(5) because, under threat of perjury prosecution or delay in or disqualification from admission, they compel every applicant to submit to unlimited and indiscriminate personal and political interrogation without an adequate foundation or probable cause first having been established on the record; and

(6) because, as applied through questionnaires, oral interrogation and other practices, they authorize an unconstitutionally broad, vague and indiscriminate inquiry into the personal and political life of each applicant.

Statement of the Case

This brief is submitted on behalf of appellants Stephen Martin Wexler and Robert M. Cover, who have passed their bar examinations and are presently applicants to the

New York Bar,[3] The Columbia Law Students Guild, an organization composed largely of law students and recent graduates of Columbia University Law School, and the New York City Chapter of the National Lawyers Guild, a bar association in New York City.[4]

Appellants are challenging the constitutional validity of the above-mentioned statutes which require applicants to undergo personal and political screening by the appellees as a prerequisite for admission to the New York Bar.

The New York admission scheme operates as follows. Under Jud. L. § 90(1)(a), the appellee courts (hereinafter "Appellate Divisions") have the sole power to grant applications made in their respective jurisdictions for state-wide admission to the New York Bar.[5] Before granting admission, the Appellate Divisions must be satisfied that the applicant has proven that he "possesses the good moral character and general fitness requisite for an attorney and counselor-at-law" [Jud. L. § 90(1)(a); Rule VIII] and that he "*believes in the form of government* of the United States and is *loyal* to such government" [CPLR 9406(1)]. (Italics supplied.)

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[3] Appellant Kaimowitz became a member of the New York Bar during the course of this litigation, see *infra*, p. 45, n. 49.

[4] A separate brief is being filed on behalf of the appellants in *Law Students Civil Rights Research Council, et al.* v. *Wadmond, et al.*, and to the extent that their legal arguments supplement ours, we incorporate them herein by reference.

[5] The State of New York is divided into four judicial departments, with an Appellate Division for each. N.Y. Const. Art. 6, § 4; Jud. L. § 70. Admission in the department of residence is, as the court below noted, "the key to lawful practice throughout the State" (A. 158), since it licenses practice before the New York Supreme Court sitting in any department and before the New York Court of Appeals.

In 1968, 1,522 applicants were admitted in the First and Second Judicial Departments comprising approximately 70% of the total admissions for that year throughout the State.

To enable the Appellate Divisions to carry out their responsibility, CPLR 9401 and 9404 authorize the appointment of the appellee Committees on Character and Fitness (hereinafter "Committees"). Under the New York scheme, these Committees are delegated not only broad investigatory powers, but are also delegated the key adjudicatory role in determining the qualifications of applicants for admission. See Rule VIII; CPLR 9401, 9404 and 9406.[6]

Thus, the Committees are charged, independently of the Appellate Divisions, with the duty of determining the applicants' political and other qualifications for receiving a certificate of admission. CPLR 9404 provides that "unless otherwise ordered by the Appellate Division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that in such respects, he is entitled to admission." Furthermore, the Committees, like the Appellate Divisions, are also directed by CPLR 9406(1) to withhold favorable action unless the applicant has furnished satisfactory proof that he believes in the form of and is loyal to the government of the United States.

The Committees' investigatory process, insofar as the present challenge is concerned, involves three principal methods of inquiry: (1) questionnaires, (2) personal interviews and (3) third-party "home life" affidavits.[7] The

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[6] See also *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 104, discussing Rule 1(d) of the New York Rules of Civil Practice, presently embodied in CPLR 9404, where the Court concluded that "the role of the Committee is more than that of a mere investigator."

[7] During the course of the litigation in the court below, the appellees narrowed somewhat the scope of the questionnaires and affidavits. However, at no time did appellees disclaim or deny either the validity or existence of the authority to re-expand the scope of inquiry. Nor did appellees give the court below any affirmative

information gathered from the questionnaire, from affidavits and the oral interview constitutes the basic evidence by which an applicant proves his qualifications for admission.

1. CPLR 9404 authorizes the Committees, subject to the approval of the justices of the Appellate Division, "to prescribe and from time to time amend a form of statement or questionnaire on which applicants shall set forth all the information and data required by the Committee." [8]

The questionnaires in both the First and Second Departments have customarily included broad inquiries into the applicant's personal and political associations, beliefs and activities (A. 53-76, 160-162, 177-183). See *infra*, n. 39, regarding the political inquiries on the Third and Fourth Department questionnaires.

Just prior to the commencement of these suits on July 16 and 17, 1968, the Appellate Divisions prepared a revised questionnaire which narrowed or eliminated some of the challenged interrogatories. Although the First Depart-

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assurance that such an expansion would not occur. For this reason and because the appellants had already suffered irreparable injury as a consequence of the practices by the time they had been discontinued, we believe it is appropriate to present these challenged interrogatories and other practices which were in effect in the First and/or the Second Department at the time the complaints were filed to demonstrate the scope of appellees' investigatory authorization.

Judge Motley presents a detailed description of the revisions that have been made in the challenged interrogatories and practices during the course of litigation. See A. 172-183.

[8] Complete disclosure is required. Sanctions for failure "fully and accurately to disclose any fact or information called for by any question" are indicated by express warnings on the questionnaire that all answers are given under oath (and are thereby subject to the perjury provisions of N.Y. Penal Law § 210.00) and that such failure may result in denial or revocation of admission. See A. 166, 177, 202, and also *Application of Portnow*, 253 App. Div. 395, 2 N.Y.S. 2d 553 (2d Dept. 1938).

ment had apparently distributed the revised questionnaires before these suits were instituted, the Secretary of the Second Department's Committee stated in an affidavit dated November 12, 1968 that the revised questionnaires were only "now being distributed to applicants." See A. 123. Despite the Second Department's delay and the fact that three other challenged interrogatories were not deleted from the revised questionnaires by either Department until November 7, 1968 (A. 161, n. 6), the majority below decided the validity only of those interrogatories which remained in effect at the time of oral argument on November 13, 1968 (A. 161-167). Those interrogatories read as follows:

> 26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.
>
> 27(a). Do you believe in the principles underlying the form of government of the United States of America?
>
> (b) Can you conscientiously, and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?
>
> 31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is "Yes", state the facts.
>
> 32(a). Have you read the Canons of Ethics adopted by the American and New York State Bar Associations?

(b) Will you conscientiously endeavor to conform your professional conduct to them?

2. Applicants are also required to obtain and submit to the Committees third-party affidavits relating personal observations of the applicant's "home life." See Jud. L. § 90(1)(a) and Rule VIII. Although the forms for these affidavits were revised after commencement of the present action, they still require the affiant to make a comprehensive evaluation of an applicant's home life. The present forms in the First Department require the affiant to state:

"6. Length and nature of affiant's acquaintance with applicant:

(a) Residence of applicant;

(b) Persons with whom applicant lives (if known to affiant).

7. Affiant's conclusions as to applicant's moral character.

8. Facts upon which affiant's knowledge or opinion as to applicant's moral character is based."

The Second Department form requires the following:

"5. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parentheses, but the particular activities should be specified.

* * *

7. What is your conclusion as to applicants' moral character? (Reserve details for next question.)

8. State in detail the facts upon which your knowledge or opinion as to applicant's moral character is based.

9. Have you visited applicants'

(a) parental home;

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(b) marital home, if any;

(c) any other home or place of abode applican may have had?

10. How often have you visited the parental, marital or other home or place of abode of applicant? ('Frequently' or 'often' or other indefinite statement is not a satisfactory answer. Note that in most cases visits will be less frequent than the contacts mentioned in Q. 6, above.)"[9]

3. After submitting the questionnaire and third-party affidavits, each applicant is scheduled for a personal interview with a member of the Committee having jurisdiction over his application. The purpose of this interview is to explore areas of inquiry disclosed by the questionnaires, affidavits or other information independently obtained by the Committee.[10] In particular the "applicant may be questioned about his affiliations with any group which might be considered subversive. He must reveal fully his views and past associations." Weinstein, Korn, Miller, *New York Civil Practice*, Par. 9406.03 (1968). See also *infra*, pp. 45, 50-53.

Appellants instituted this action on July 17, 1968, for declaratory and injunctive relief, charging that the political and personal screening process for admission to the New York Bar violated the rights of applicants and law students to the privacy of their associations, beliefs, speech and activities and to the exercise of these First Amendment guarantees free from penalizing or inhibiting regulation. Appellants also charged that the admission process has the further impermissible effect of culling out prospective

[9] Pertinent portions of the original affidavit forms are set forth in Judge Motley's opinion (A. 172-174).

[10] The Committees have a wide variety of sources of information including the applicant's university and law school records, police files (applicants in the Second Department are fingerprinted) and reports by attorneys or other persons made in response to notices placed by the Committee in the New York Law Journal.

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attorneys with "controversial", "radical" or "unorthodox" political and social views with the result that the class of unpopular, segregated and poor litigants is deprived of effective and sympathetic assistance of counsel and free access to federal and state courts.

The court below rendered its decision on February 17, 1969 with Judge Motley concurring in part and dissenting in part. Final judgment was entered on June 16, 1969, partially granting the appellees' motion to dismiss the complaints and partially denying appellants' motion for summary judgment and injunctive and declaratory relief.

The majority ruled that Jud. L. § 90(1)(a), CPLR 9401, 9404 and 9406(1) and Rule VIII were constitutional on their face. Appellants' challenge to these provisions as applied was also rejected by the majority except as to Questions 26, 27(a) and 31 (A. 162-168).

The court held that question 26 (*supra*, p. 7) deterred appellants' exercise of First Amendment rights because it was not limited to membership which coincided with organizational teaching or advocacy and "to cases where the applicant knew of the teaching or advocacy" (A. 165).[11]

In compliance with the court's order, appellees offered to change Question 26 to read as follows:

> "26(a). Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof

[11] Final judgment was deferred for 90 days by the court to permit the appellees to evaluate their practices and to report back to the court on the steps they would take to conform their practices with constitutional requirements (A. 169). The court below made no mention in its judgment of whether it accepted or rejected appellees' revision of Question 26.

should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.

(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any State or any political subdivision thereof by force, violence or any unlawful means?"

Question 27(a) (*supra*, p. 7) was found impermissibly vague. See A. 162-163. In the judgment (A. 228), the Court ordered the question to be reworded as follows:

"27(a). Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the Constitutions of the United States and of the State of New York? If there is, please explain." [12]

As for Question 31 (*supra*, p. 7) the court held that it constituted a "catch-all" which had a "serious *in terrorem* effect" (A. 116). The court found "no interest of the state sufficiently compelling to require an applicant to engage in the soul-searching of his entire past life." *Ibid.*

Summary of Argument

A. The challenged statutory scheme creates a program for screening the political fitness of applicants to the New York Bar. This, in essence, is a system of political censorship similar to those which were recently curtailed by this Court in cases involving public employees and licensees. Political controls of admission to the Bar jeopardize rights and interests beyond those of the personal liberties and

[12] The court rejected appellees' proposed rewording (A. 217): "Do you believe in the constitutional form of government of the United States?"

privacy of applicants. They affect the independence of the Bar and the rights of dissident minority groups to sympathetic counsel of their own choice.

B. An applicant's political background is not relevant to the consideration of his moral character for admission to the Bar. Political activities, even where they involve unlawful speech or association, bear no rational relation to one's ability to fulfill his professional responsibilities. Nor is it possible for character committees, given their composition, to judge the morality of an applicant's political beliefs, speech or conduct.

C. New York's statutory scheme also violates this Court's rule requiring precision of regulation in the area touching First Amendment rights. That scheme will discourage the political activities of many law students and will adversely affect the admission of others to the Bar and the availability of counsel to minority groups.

1. This devastating effect on personal and public interests requires that New York rely upon a less restrictive alternative method of regulation than its present political screening program. Such an alternative is also required because New York's present scheme is a form of prior restraint. Therefore, New York should be limited to a measure less drastic in its effect upon First Amendment rights, namely, criminal or disciplinary sanctions for proven misconduct.

2. The substantive tests for admission, "good moral character and general fitness" and "[belief] in the form of government of the United States and [loyalty] to such government" are unconstitutionally vague and overbroad.

a. The standard of good moral character is satisfactory if it is based upon the traditional elements of integrity and trustworthiness. It is constitutionally deficient where it is based upon considerations of political fitness.

b. The standard of belief in and loyalty to the form of government of the United States is too vague under the recent decisions of this Court in the field of employment and licensing. This vagueness is not cured by a narrowing, *but unspecified* "interpretation", derived from appellees' revised questionnaire. The questionnaires do not purport to define this standard; rather, they initiate a sweeping inquiry of the applicant's political life.

This standard is also unconstitutionally overbroad because it is predicated upon mere *beliefs* and because it penalizes belief and advocacy which are protected by the First Amendment.

3. CPLR 9406(1) unconstitutionally imposes a burden of proving loyalty on applicants in violation of this Court's decision in *Speiser* v. *Randall*, 357 U.S. 513. This has an inhibiting effect upon the exercise of First Amendment rights.

The burden of proof cannot be justified on the ground that it operates upon prospective members of the Bar. Members of the Bar are not public employees whose duties justify governmental regulation of their political activities. Lawyers pose no danger to the state in the exercise of their professional functions. Hence, New York may not employ this procedure with its "drastic" impact on the exercise of First Amendment rights.

4. The investigatorial apparatus also lacks the sensitive procedural tools required to obviate the dangers of political inquiry.

a. It permits the appellees to discriminatorily intensify their political examination and delay admission of an applicant who has engaged in unorthodox political activities.

b. It authorizes an inquiry into protected speech, association and beliefs without a factual basis for such a search. This point was not decided by this Court in earlier Bar

admission cases which involved both narrower questions and some foundation for inquiry. In the analogous cases involving legislative investigations, the First Amendment has been held to require probable cause or a foundation for inquiry. Such a rule is even more appropriate here where the appellees possess an adjudicatory, as well as an investigatory power. Such proof of probable cause has been required in other situations involving far more compelling and immediate state interests.

c. It authorizes a sweeping and indiscriminate inquiry into the applicant's political and personal life. Moreover, the particular questions approved by the court below [Question 26 and Question 27(a) and (b)] are vague and overbroad. Question 26 also improperly requires an applicant who answers subsection (a) in the affirmative to disprove the appellees' unsupported assumption as to the organization's unlawful purposes.

d. The infringement of applicants' First Amendment rights by New York's screening program is the inevitable consequence of its having undertaken to enforce a political test. Such a task is a subjective one; it is governed by contemporary community standards, and it bears no relationship to the traditional concern of the Bar for applicants of good moral character.

e. The majority below erred in confining its review of the breadth and vagueness of the statutory scheme to the questionnaires and other practices in effect at the time this case was argued below and in disregarding practices in effect for at least two decades. These long-standing practices which demonstrate a pervasive application of these statutes in violation of constitutional limitations require a ruling that this statutory scheme is invalid on its face.

ARGUMENT

NEW YORK'S PERSONAL AND POLITICAL SCREENING PROGRAM FOR APPLICANTS TO THE BAR VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

A. Introduction

The power asserted by New York to screen the "political fitness" of applicants to the bar is in essence one of political censorship. As such, it falls into the category of state regulation most suspect and abhorred under our constitutional system. Cf. *Carroll* v. *Princess Anne*, 393 U.S. 175, 181; *Freedman* v. *Maryland*, 380 U.S. 51, 57.

Political censorship, previously accepted as the price one paid for a teaching license or other public employment and benefits, has in recent years been sharply curtailed by this Court. The premise of earlier cases that governmental employment, licenses or benefits could be conditioned upon surrender of First Amendment rights has been explicitly rejected.[13] Ironically, a Judge Motley points out, the Bar that won the political freedom for others, still remains subject, as the New York scheme illustrates, to this discarded premise and to a blatantly unconstitutional form of political control (A. 197).

Like the *Baird* and *Stolar* cases,[14] the present case involves vague and overbroad political tests, unconstitutional

[13] This was done in a series of recent employment and licensing cases in which the Court struck down vague and overbroad political regulations which penalized or inhibited the exercise of First Amendment rights. See *Pickering* v. *Board of Education*, 391 U.S. 563, 568; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606; *Schneider* v. *Smith*, 390 U.S. 17; *United States* v. *Robel*, 389 U.S. 258; *Aptheker* v. *Secretary of State*, 378 U.S. 500.

[14] *Baird* v. *State Bar of Arizona*, No. 53 (O.T. 1969); *In the Matter of the Application of Stolar*, No. 75 (O.T. 1969).

burdens of proof as to loyalty and sweeping and indiscriminate political inquiries which violate this Court's rulings in, among others, *Brandenburg* v. *Ohio*, 395 U.S. 444; *Schneider* v. *Smith*, 390 U.S. 17; *United States* v. *Robel*, 389 U.S. 258; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Speiser* v. *Randall*, 357 U.S. 513. These obvious constitutional deficiencies could have been viewed as sufficient grounds for deciding the *Baird* and *Stolar* cases. But in noting jurisdiction in this case and in ordering the reargument of *Baird* and *Stolar*, the Court has before it a representative sampling of the political censorship imposed on admission to the bar in every state and in some federal jurisdictions.[15] This provides the Court with an appropriate basis not only for reviewing the constitutional propriety of certain political tests and of the investigatorial apparatus by which these tests are implemented, but the Court may now also undertake the comprehensive reevaluation we have urged in our *Stolar* brief and oral argument regarding the validity of any political qualifications and political screening programs in the sensitive area of bar admissions.

In reurging this broader review, we are not unmindful of the decision in the second *Konigsberg* case which was echoed in the majority's opinion below. Upholding the validity of questioning applicants with respect to mem-

[15] See generally Brown v. Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480 (1953); Countryman & Finman, *The Lawyer and Modern Society*, 758, 822-884 (1966); Ginger & Koenigsberg, *Report on Rules for Admission to the Bar; Tests of Applicants' "Loyalty" and "Good Moral Character"*, 18 Law. Guild Rev. 58 (1958); 1 Emerson, Haber & Dorsen, *Political and Civil Rights in the United States*, 262-283 (L.Ed. 1967); Rosenberg, *Constitutional Limitations on the Process of Admission to the Bar*, 23 N.Y.U. Intra. L. Rev. 135 (1968); Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 Tex. L. Rev. 267, 270-271 (1970).

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ership in the Communist Party, this Court in the second *Konigsberg* case found that

> "[w]ith respect to this question of Communist party membership, we regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented." 366 U.S. 36, 52.

The majority below took this to mean that New York may test a bar applicant's "*belief* at the time of admission" in "the essentials, democratic government and change by lawful methods" (A. 154-155, 162) (Emphasis supplied).

We believe that the majority below misread the meaning of that quoted portion of the *Konigsberg* opinion in that devotion to procedures for orderly change requires only that a lawyer *conduct* his practice in an ethical and legal way, not that he forfeit his First Amendment freedom to *believe* what he will. See A. 197, and *infra*, p. 38. The reading we have suggested is compatible with, and indeed required by, the Court's decisions since *Konigsberg*. See *supra*, p. 15 and n. 13.

The view of the majority below also strikes at the heart of the right of minority and dissident groups and their members to counsel of their own choice who is sympathetic or associated with their cause. Events of the last decade have revealed a new perspective on the role of lawyers and law students in representing those struggling against social injustices and inequities. Almost in belated response to Chief Justice Stone's condemnation of a large segment of the bar as the "obsequious servant of business . . . tainted with the morals and manners of the market place in its most anti-social manifestations" and his call for lawyers devoted to bearing their social responsibilities,[16]

[16] Stone, *The Public Influence of the Bar*, 48 Harv. L. Rev. 1, 7, 13-14 (1934).

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a growing number of lawyers, particularly recent law school graduates,[17] and law students, acting independently and through the appellant organizations,[18] have allied themselves with the poor and the racially and politically oppressed.

The nature of this alliance is both political and professional; their legal assistance has been offered out of a sense of moral support for the activities and goals of the minority and dissident groups, even where these activities entail civil disobedience and the goals embrace revolutionary ideologies. This alliance has become indispensable to the protection of the rights of minority and dissident groups both because the bar generally has failed to meet

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[17] See *NAACP* v. *Button*, 371 U.S. 415, 430-438, 443-445; Pollitt, *Counsel for the Unpopular Cause: The "Hazard of Being Undone"*, 43 N.C.L. Rev. 8 (1964); Nader, *Law Schools and Law Firms*, 162 N.Y.L.J. p. 1 (Nov. 25, 1969); "New Lawyers Bypass Wall Street", *N. Y. Times* p. 37, col. 3 (Nov. 19, 1969); "New Breed of Lawyers Serving Poor", *N. Y. Times*, p. 11, col. 2 (Aug. 30, 1969); Note, *Law Students: Unconstitutional Bar Admission Procedures*, 18 Catholic U.L. Rev. 534, 537 (1969); Glickstein, *U.S. Civil Rights Commission and the Fight Against Racism*, 27 Guild Pract. 184 (1968); *The Movement and the Lawyer*, 28 Guild Pract. 1 (1969); "Activist Lawyer With a Cause," *N. Y. Times*, p. 29, col. 5 (Feb. 17, 1970); *N. Y. Times*, p. 1, col. 3 (Sept. 30, 1969).

[18] See Pollitt, *supra* at 9, 30; Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 Harv. L. Rev. 381, 341, 343 (1967); see also A. 51.

The role played by law students in civil rights, civil liberties and poverty litigation, as research assistants or as counsel under special programs allowing third-year law students to represent indigents in civil and criminal actions (see Jud. L. § 478) should be emphasized in calculating the impact of New York's screening program on the availability of legal assistance in these areas. Because of a shortage of lawyers, adequate assistance of counsel for poor persons, prisoners or the racially or politically oppressed, has come to depend directly on the services of law students. See generally *Johnson* v. *Avery*, 393 U.S. 483, 489 and n. 9 and 491 (Mr. Justice Douglas concurring); *Hackin* v. *Arizona*, 389 U.S. 143, 146 (Mr. Justice Douglas dissenting); Roberts, *Social Crises and the Lawyer and Law*

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its obligations to these groups [19] and because these groups, themselves, have sought lawyers who will serve their cause with undivided attention and loyalty.[20]

Political screening of bar applicants therefore jeopardizes more than the personal liberties of law students and applicants; it threatens an interest of overriding importance to our society—the independence of the bar—and the fundamental right of the poor and racially and politically oppressed to associate with sympathetic counsel of their own choice.[21]

Student: An Essential Meeting, 14 Villanova L. Rev. 377 (1969); Lewis, "A Talk With Warren on Crime, the Court, the Country", *N. Y. Times Magazine*, pp. 34, 11-133 (Oct. 19, 1969); "Law Students Gain Successes in Aiding Indigent Clients Here", *N.Y. Times*, p. 72, col. 1 (Apr. 7, 1968); *N. Y. Times, supra*, p. 11, col. 2 (Aug. 30, 1969); *N. Y. Times*, p. 64, col. 3 (Sept. 14, 1969); "Boycott Affects Yale Law School," *N. Y. Times*, p. 52, col. 1 (Oct. 29, 1969).

[19] See *NAACP* v. *Button*, *supra* at 443; *Sanders* v. *Russell*, 401 F. 2d 241, 245 (5th Cir. 1968); *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280, 286 (5th Cir. 1964); *Sobel* v. *Perez*, 289 F. Supp. 392 (D.La. 1968) and the Brief of the Attorney General of the United States as Plaintiff-Intervenor therein; Remarks of Mr. Justice Brennan at Notre Dame Law School, *N. Y. Times*, p. 53, col. 1 (Feb. 9, 1969); Pollitt, *supra*, at 23-24; Note, *supra*, Harv. L. Rev. at 1721-1722; Alexander, *The Right to Counsel for the Politically Unpopular*, 22 Law in Trans. 19, 22-24 (1962); *N. Y. Times*, p. 60, col. 4 (Sept. 4, 1967).

[20] See *NAACP* v. *Button*, *supra* at 429-431; Casper, *Lawyers and Loyalty-Security Litigation*, 4 Law and Society Rev. 575, 581-582 (1969); Pollitt, *supra*; "Blacks Form Pro-Militant Legal Unit", *N. Y. Times*, p. 45, col. 1 (June 1, 1969); *N. Y. Times*, p. 48, col. 6 (Jul. 21, 1969); "Rights Group Aids 13 Panthers Here", *N. Y. Times*, p. 74, col. 1 (Aug. 5, 1969); Alexander, *supra*; cf. *United States* v. *Harpole*, 263 F. 2d 71, 82 (5th Cir. 1959); "The Revolt of the Civil Rights Division", Cong. Rec., p. 10705 (Dec. 16, 1969); *N. Y. Times*, p. 1, col. 6 (Aug. 28, 1969).

[21] See *Konigsberg* v. *State Bar*, 353 U.S. 252, 273; *NAACP* v. *Button*, *supra*; *In re Sawyer*, 360 U.S. 622; *Sanders* v. *Russell*, *supra*; Chafee, *Blessings of Liberty*, 157-176 (1956); Conference Working Group, *The Independence of the Bar*, 13 Law. Guild Rev. 158 (1953).

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The spectre of the nearly successful attempt to purge the politically unpopular from the bar during the McCarthy period is too familiar for this Court to ignore the dangers which inhere in the present example of political regulation. As the Committee on Law Reform of the Association of the Bar of the City of New York stated in its celebrated report on *Loyalty Oaths for Lawyers*:

> "The establishment of the oath requirement might lessen the freedom of the Bar to accept the responsibility of representing unpopular causes. At this time, when Communists are being more frequently called upon to appear in courts, it is essential that they should not be deprived of counsel of their own choice." *The Proposed Anti-Communist Oath: Opposition Expressed*, 37 A.B.A.J. 123, 125 (1951).

During the last decade political screening programs took a different form: this involved coercive efforts, including violence, to prevent the NAACP, the National Lawyers Guild and other organizations from providing local and out-of-state attorneys to fight racial segregation and oppression in the South.[22]

This experience demonstrates, as one observer concluded, that in periods or places of political repression, it has been the "ability of the profession to encompass" politically radical lawyers which "was crucial to its ability to provide representation" for minority and dissident groups.[23]

To permit political censorship of the profession in the form of New York's screening program not only critically affects the ability of minority and dissident groups to obtain vindication of their federal rights or an effective defense but, in a special sense, it also denies their right to freedom of speech. For, as this Court has recog-

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[22] See *supra*, p. 19, n. 19. See also *In re Brown*, 346 F. 2d 903 (5th Cir. 1965); Hammer, *"Yankee Lawyer Go Home"*, *N.Y. Times*, Sect. 4, p. 8, col. 1 (Mar. 12, 1967).

[23] See Casper, *supra* at 594-595; see also Countryman, *Loyalty Tests for Lawyers*, 13 Law. Guild Rev. 149, 157 (1953); Symposium, *The Right to Counsel and the "Unpopular Cause"*, 20 U. of Pitt. L. Rev. 727 (1959).

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nized, litigation provides the poor, the segregated and the politically unpopular with an available and inexpensive mode of expressing their social and political beliefs. See *NAACP* v. *Button*, *supra* at 428-429, 431, 444-445; *Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217; *United States* v. *Robel*, *supra* at 283 n. 1 (Mr. Justice White dissenting); *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1; Casper, *Lawyers, The Supreme Court, Civil Liberties and Civil Rights* (to be published in Stan. L. Rev., Apr., 1970). This method of expression has become increasingly important and, in some circumstances, indispensable to many political movements which sometimes view the judiciary as the only responsive institution and meaningful forum in which questions of social justice can be resolved.

B. Under the First Amendment, No Political Test May be Imposed for Admission to the Bar

While, in the light of the constitutional infirmities next to be discussed, this case does not *compel* a decision upon the point, the increasingly critical importance of the First Amendment, the independence of the Bar, and the right to sympathetic counsel of minority and dissident groups (*supra*, pp. 15-20) justify a broad ruling by this Court that no political test whatsoever—even knowing membership in a political organization with the specific intent to advance its illegal purposes—may constitutionally be imposed upon applicants for admission to the Bar.

We recognize that this broad statement runs counter to the implications, at least, in the majority opinions of this Court in *Konigsberg* v. *State Bar*, *supra*, and *In re Anastaplo*, 366 U.S. 82. Factually, those cases may be distinguished on the ground that they involved questions concerning the Communist Party which has been treated as *sui generis* by this Court in the light of Congressional and judicial findings.[24] Nevertheless, we urge a reconsideration

[24] *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539; *Barenblatt* v. *United States*, 360 U.S. 109, 127-128; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 266 (concurring opinion of Mr. Justice Frankfurter).

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of the underlying assumptions because they are irrelevant to the concept of "good moral character," inevitably introduce ambiguous political considerations running counter to the nature and needs of our democratic society, and represent a departure from the sounder assumptions underlying this Court's decisions of a century ago in the justifiably famous cases of *Ex parte Garland*, 71 U.S. (4 Wall.) 333, and *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277.

Our analysis of the problem begins with the statement of a principle that will not be in dispute in this Court, namely, that any qualification for membership in the Bar, whether imposed by court or legislature, must, under the due process clauses of the Fifth and Fourteenth Amendments, have a "rational connection with the applicant's fitness or capacity to practice law." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239. As Mr. Justice Frankfurter added in his concurring opinion:

> "From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character'." *Id.* at 247.

Except for occasions of political stress, this standard of good moral character has been historically limited to questions of personal morality, reliability and honesty necessary to assure adequate representation of clients in litigation and otherwise. Thus, in the first *Konigsberg* case, Mr. Justice Black referred to "good moral character" as representing in California "an absence of proven conduct or acts which have been historically considered as manifestations of moral turpitude." *Konigsberg* v. *State Bar*, 353 U.S. 252, 263. Very recently the California Supreme Court reaffirmed this view in admitting to the Bar an applicant with a long series of arrests. *Hallinan*

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v. *Committee of Bar Examiners*, 421 P. 2d 76 (Cal. 1966); see also Cardozo, J. in *Matter of Rouss*, 221 N.Y. 81, 91 (1917).

But political beliefs and conduct have no connection whatsoever with one's "fair private character"—the significant phrase of *Ex parte Garland, supra* at 378—and hence, with the constitutional right to practice law. This Court recognized that fact in the companion case of *Cummings* v. *Missouri, supra* at 320, when it said of similar political disqualifications of clergymen:

> "It is manifest upon the single statement of many of the acts and of the professions and pursuits that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the profession and pursuits."

It is true that in difficult periods in this country attempts, sometimes successful, have been made to deprive lawyers of their right to practice because of their political activities,[25] some of which were deemed to be, and sometimes were, serious violations of law. Examples include the actions taken or proposed against lawyers in New York State following the Revolution,[26] the test oaths introduced after the Civil War to prevent the practice of law by lawyers who took up arms against the government,[27] and the so-called Cold War period of our own century.[28] But the fact that lawyers, like other groups, have subjected one another to oppression because of political activities

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[25] Rosenberg, *Constitutional Limitations on the Process of Admissions to the Bar, supra;* Koenigsberg and Stavis, *Test Oaths: Henry VIII to the American Bar Association*, 11 Law Guild Rev. 111 (1951); Chafee, *supra.*

[26] See 2 Chroust, *The Rise of the Legal Profession*, 5-12 (1965).

[27] Koenigsberg and Stavis, *supra* at 119-120.

[28] Countryman, *Loyalty Tests for Lawyers, supra;* Brown & Fassett, *supra;* Conference Working Group, *The Independence of the Bar, supra* at 159-172.

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does not in any way make such political activities, whether they be criminal or not, an indicium of bad moral character.

Political conduct—even if it is ultimately held to be criminal—is not fungible with or in any way related to the concept of moral character for admission to the Bar. This is undoubtedly true as to institutionalized violations of the law, such as the case of a Selective Service registrant who refuses induction in order to obtain judicial review of the validity of his classification (cf. *Clark* v. *Gabriel*, 393 U.S. 256) or generally of any person who seeks to test the validity of a particular statute (see *Keegan* v. *United States*, 325 U.S. 478; *Douglas* v. *City of Jeannette*, 319 U.S. 157). Of course, whether or not the individual ultimately prevails in the criminal prosecution has no bearing on his moral qualifications for admission to the Bar. See *Report of the National Commission on the Causes and Prevention of Violence*, 90-91 (1969).

The same result obtains where an applicant has engaged in civil disobedience. Here both the complexity of the issues and historical support for such conduct belies any moral judgment. Thus in *Hallinan* v. *Committee of Bar Examiners*, *supra*, the court ruled that an applicant could not be excluded from the Bar on the basis of convictions for unlawful assembly, disturbing the peace, or criminal trespass in connection with civil rights demonstrations or for his beliefs in the efficacy of sit-ins to combat discriminatory employment policies. The court stated:

> "Whether these activities involve moral turpitude is dependent upon the issues involved and the motivation of the violator. Of course, we do not mean to condone disobedience of the law in any form; we mean only to express strong doubt that the leaders of the current civil rights movements are today or will in the future be looked upon as persons so lacking in moral qualifications that they should for that

reason alone be prevented from entering their chosen profession.

> To the extent that acts of civil disobedience involve violations of the law it is altogether necessary and proper that the violators be punished. But criminal prosecution, not exclusion from the bar, is the appropriate means of punishing such offenders . . . If we were to deny to every person who has engaged in a 'sit-in' or other nonviolent civil disobedience, and who has been convicted therefor, the right to enter a licensed profession, we would deprive the community of the services of many highly qualified persons of the highest moral character." *Id.* at 87.[29]

See also Douglas, *Points of Rebellion*, 95 (1970); *Report of the National Commission on the Causes and Prevention of Violence*, 91-118 (1969); Note, *Admission to the Bar Following Conviction for Refusal of Induction*, 78 Yale L.J. 1352 (1969); but see *Application of Brooks*, 355 P. 2d 840 (Wash. 1960) *cert. denied*, 365 U.S. 813.

So also in *Schware* v. *Board of Bar Examiners, supra*, this Court assumed that even if the applicant had violated the Neutrality Act of 1917 by recruiting volunteers to go overseas to aid the Loyalists in the Spanish Civil War, such an offense would not warrant exclusion from the bar. 353 U.S. at 242-243.

But the most direct example involves this Court's decision in *Ex parte Garland, supra*, where a future Attorney General of the United States[30] successfully overturned a

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[29] See § AA 51-2.0 of the Administrative Code of the City of New York, which prohibits the denial of any license, right, benefit or privilege extended by the Code solely because of conviction for "act or acts arising out of any peaceful demonstration or other peaceful activity, the object of which is to resist discriminatory treatment in any place of public accommodation . . . or to achieve equal rights for all persons . . ."

[30] Garland, *Experience in the United States Supreme Court* (1898).

statutory disqualification for practice in the federal courts based upon his participation in the rebellion against the United States. As the dissenting opinion in this Court pointed out, nothing could have been more serious than the charges involved which included treason. Nevertheless, while the decision technically falls under the rubrics of bill of attainder and *ex post facto* law, it is a clear recognition that the serious political crimes on the part of Mr. Garland and other leaders of the Confederacy bore no rational connection with the issue of good moral character.[31]

The considerations which move men under certain circumstances even to take up arms against their government, as *Garland* and *Cummings* indicate, are not evidence of moral turpitude, as our own history so well illustrates. See Douglas, *supra* at 95. Professor Vern Countryman, in his masterly analysis of the problem many years ago, concluded that "[t]he power to license professions is not a power to license methods of governmental change." Countryman, *supra* at 156.

We submit, therefore, that even if New York were to rewrite its standards and to limit its interrogation to actual conduct in an attempt to meet tests of due process and of criminality, it would continue to violate the basic principle which we urge to this Court, namely, that no political associations, activities or statements may, consistent with the Fourteenth Amendment, obstruct admission to the Bar.

C. New York's Screening Program Violates this Court's Rule Requiring Precision of Regulation in the First Amendment Area

When measured against this Court's rule of precision, New York's screening program and its implementation by

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[31] See also *In re Baxter*, 2 Fed. Cas. 1043 (E.D. Tenn. 1866); *In re Shorter*, 22 Fed. Cas. 16 (D. Ala. 1865); *Ex parte Law*, 35 Ga. 285 (1866); but see *Ex parte Quarrier*, 2 W. Va. 569 (1866).

appellees is plainly revealed as a crude and oppressive mechanism for political censorship.

In *NAACP* v. *Button*, 371 U.S. 415, 438, the Court stated the governing principle, frequently reaffirmed thereafter,[32] that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

The "precision" rule is designed to safeguard the "breathing space" essential to the survival of First Amendment rights of free speech and free association (*id.* at 433; *Gibson* v. *Florida Legislative Comm.*, 372 U.S. 539, 544; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604).

The rule has a particularly important function in cases involving political investigation because it erects a barrier against governmental interference with an individual's right of associational privacy, which "may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v. *Alabama*, 357 U.S. 449, 462; *Gibson* v. *Florida Legislative Comm.*, *supra*, at 544.

Where, as here, state regulation affects important public as well as private interests, "precision" is doubly crucial. Cf. *Sweezy* v. *New Hampshire*, *supra* at 265-267 (Mr. Justice Frankfurter concurring).

The decision of the majority below sanctioning New York's screening program violates the rule of "precision" in four major respects:

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[32] See *Aptheker* v. *Secretary of State*, *supra*, at 512, 513; *United States* v. *Robel*, *supra*, at 265; *Keyishian* v. *Board of Regents*, *supra*, at 603-604.

1. New York's Screening Program is an Overly Drastic Method of Regulation

Assuming *arguendo* that New York's objective was a legitimate one of preventing improper professional conduct, the destructive effect upon personal and public interests, previously noted, compels the state to choose a less drastic alternative than the course presently followed. For "[m]ere legislative preferences" are not sufficient justification for effectuating a state purpose "by means that [diminish] the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *State*, 308 U.S. 147, 161; *Thornhill* v. *Alabama*, 310 U.S. 88, 96. "The breadth of legislative abridgment must be viewed in the light of less drastic means of achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488.

Therefore, New York, like Congress, "must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. The Constitution and the basic position of First Amendment rights in our democratic society demand nothing less." *Robel* v. *United States*, 389 U.S. 258, 268; *United States* v. *O'Brien*, 391 U.S. 367, 377; Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969); cf. *Toth* v. *Quarles*, 350 U.S. 11, 23.

The dangers of political screening are well known. See *Schneider* v. *Smith*, 390 U.S. 17; *Keyishian* v. *Board of Regents, supra;* Douglas, *Points of Rebellion*, 17-33 (1970). Such programs are comprised of two elements—inquisitorial investigation and prior restraint—which have been found time and again by this Court to pose a severe threat to the free exercise of First Amendment rights.

The wholesale invasions of political privacy instigated pursuant to the federal loyalty-security program, which Mr. Justice Douglas characterized as "the most blatant violations of the First Amendment we have ever known" [*Brandenburg* v. *Ohio*, 395 U.S. 444, 456 (concurring opin-

ion)] serve to underscore the vulnerability of personal liberties when exposed to inquisition and possible sanctions by a government agency having a throttle-hold on an individual's job or professional career.

New York's exclusion from the Bar for past political beliefs or associations also operates in the manner of the classic systems of prior restraint, where *all* future speech is prohibited to ensure that no unlawful speech will take place. See e.g. *Carroll* v. *Princess Anne*, 393 U.S. 175; *Kunz v. New York*, 340 U.S. 290; *Thomas* v. *Collins, supra; Thornhill* v. *Alabama, supra;* Bruff, *Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 Hastings L.J. 129, 135 (1969). When viewed from the public interest in the independence of the Bar and the availability of attorneys willing to offer sympathetic counsel to the politically outcast, this element of prior restraint looms as the dominant vice in New York's screening program.

The apparent purpose of screening the political fitness of applicants to the New York Bar is to safeguard clients and courts from the possibility of unprofessional behavior by attorneys having disfavored political leanings. But the sweep of New York's program is too indiscriminate. It is certainly irrational to predict that an applicant will *engage* in unethical behavior when admitted because he does not *believe* in the form of government of the United States (or at least cannot "furnish satisfactory proof" to that effect).

Even if the scope of New York's screening program were confined to unlawful speech and associations, the intimidating aspects of such a program remain undiminished. The fact that appellees sit in *moral* judgment over the applicant's political activities (see discussion of *Schware* and *Hallinan, supra*, pp. 24-25), that the elements of unlawful speech and association are subtle and their application in particular cases, even by this Court, has

produced sharp differences of opinion (see *Scales* v. *United States*, 367 U.S. 203, 232; *Speiser* v. *Randall*, 357 U.S. 513, 535; *Thomas* v. *Collins*, 323 U.S. 516, 529-530) and that there is a possibility of misjudgment, mistake or intentionally biased fact finding which in almost all events would be binding on review by this Court [*Application of Patterson*, 353 U.S. 952, *on remand* 318 P. 2d 907 (Wash. 1957), *cert. denied* 356 U.S. 947; see also *Speiser* v. *Randall*, *supra*; *Garrison* v. *Louisiana*, 379 U.S. 64, 80-82 (Mr. Justices Black and Douglas concurring); *Thornhill* v. *Alabama*, 310 U.S. 88, 97] make prior screening of an applicant's political fitness, at the very least, an extreme procedure.

Whatever dangers exist, the state, as Judge Motley concluded, is amply protected by the less restrictive alternative available through criminal and disciplinary sanctions. See A. 204, cf. *Stanley* v. *Georgia*, 394 U.S. 557, 566-567; *Kunz* v. *New York*, *supra*.

Such alternatives would permit subsequent punishment for defined conduct, in the context of actual, not imagined or hypothetical, injury to the state and under procedures ensuring a fair, speedy and reliable determination. As Mr. Justice Brandeis wrote: "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violation of law . . ." *Whitney* v. *California*, 274 U.S. 357, 378 (concurring opinion). See also *Thomas* v. *Collins*, *supra*, at 538-543; *United States* v. *Spock*, 416 F. 2d 165 (1st Cir. 1969) (Coffin, J. dissenting); cf. Monaghan, *First Amendment "Due Process"*, 83 Harv. Rev. 518, 543 (1970).

2. The Political Tests for Admission to the New York Bar Are Unconstitutionally Vague and Overbroad

The substantive tests for admission embodied in Judicial Law § 90(1)(a) and Rule VIII: "good moral character

and general fitness," and in CPLR 9406(1): "believes in the form of government of the United States and is loyal to such government" are impermissibly vague and overbroad.

a. *"Good moral character and general fitness"*

The statutory requirement of "good moral character" does not create constitutional problems if it is read in its ordinary sense, as, indeed, New York has generally done. See *infra*, p. 33. The vagueness and overbreadth arise, as Judge Motley indicated (A. 193-197) when there is imported into it the element of political fitness. The standard then becomes one which is "wholly lacking in 'terms susceptible of objective measurement'." *Keyishian* v. *Board of Regents*, *supra* at 604.

This is demonstrated by *Application of Cassidy*, 268 App. Div. 282, 51 N.Y.S. 2d 202 (2d Dept. 1944), *aff'd without opinion*, 296 N.Y. 926, 73 N.E. 2d 41 (1945), where an applicant was denied admission under this standard, in part, because of his "belief in the resort to force to overthrow the existing form of government of the United States". *Id.* at 284. Citing *People* v. *Gitlow*, 195 App. Div. 773 *aff'd*, 234 N.Y. 132, 1923, the court ruled that the First Amendment protections did not extend to belief in or advocacy of unlawful methods of change. *Application of Cassidy*, *supra* at 285-286. Admission to the bar was denied upon these grounds despite the fact of prior acquital of the applicant by a federal jury of a charge of conspiracy to overthrow the government. The court ruled that

> "acquittal in a criminal action cannot be deemed to be *res judicata* here upon any issue, for the purpose and scope of an inquiry to determine an applicant's character and fitness to become a member of the Bar are essentially different . . . Conduct not descending to the level of guilt of the violation of a criminal statute may well present an insuperable obstacle to admission to the Bar if such conduct evinces a lack

> of that 'character and general fitness requisite for an attorney and counsellor-at-law'." [33]

The *Cassidy* case illustrates the existence of a potential threat to the exercise of First Amendment rights when the "good moral character" standard is infused with political considerations; for unless one uses that standard in a traditional sense, the term "good moral character" becomes what Mr. Justice Black described in *Konigsberg* v. *State Bar*, 353 U.S. 252, 262-263, an "unusually ambiguous" and "vague qualification, which is easily adapted to fit personal views and predilections [and] can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law". Such a standard is constitutionally intolerable in the area of free expression where "standards for permissible statutory vagueness are strict". *NAACP* v. *Button*, *supra* at 432, 433; *Cramp* v. *Board of Public Instruction*, 368 U.S 278, 287; *Baggett* v. *Bullitt*, 377 U.S. 360, 374.

In upholding § 90(1)(a) and Rule VIII against charges of vagueness, the majority below relied upon the statement in the second *Konigsberg* case that the "burden of proof of good moral character" was a "requirement whose validity is not, nor could well be drawn in question". 366 U.S. at 40-41 (A. 151). But as Judge Motley points out (A. 189-190), the "good moral character" qualification was not challenged by Konigsberg, and the Court's attention was not directed toward the substantive validity of the phrase

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[33] This view has not been discarded. Thus, appellees' statement in their Motion to Affirm (p. 10) that the Committees "might . . . conclude" the implication being apparent that the Committees do not recognize any obligation—that an applicant who answered Question 26 (see *supra*, pp. 10-11) affirmatively should not be denied admission, absent a showing of imminent lawless action, gives current illustration of the breadth of the power appellees have arrogated to themselves under the "good moral character" standard.

"good moral character"; rather, it was concerned solely with the burden of proof requirement.[34]

Implicitly recognizing the ambiguity in its construction of the phrase "good moral character," the majority below also sought to give it clarity by referring to the "content [it had acquired] through years of administration" (A. 151). On the contrary, that "content", as reflected in the adjudicated cases from the beginnings of the New York Bar [35] relates to dishonorable conduct, lack of candor and misrepresentation by the applicant. The inclusion of "political fitness" is a relatively recent by-product of the McCarthy period which serves only to create ambiguity.

b. *"Believes in the form of government of the United States and is loyal to such government"*

1. References in CPLR 9406(1) to "believe in the form of government of the United States and is loyal to such government" are equally vague.

Their imprecision is demonstrated, as Judge Motley noted, by comparison with similar phrases found unconstitutionally vague in *Keyishian* v. *Board of Regents, supra* at 593 ("utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act"); and in *Baggett* v. *Bullitt, supra* at 361, 371-372 ("respect for the flag and institutions of the United States . . . and un-

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[34] The burden of proving good moral character, where that qualification embraces a concept of loyalty and political fitness, violates the proscriptions against such a procedure announced in *Speiser* v. *Randall, supra.* See also the discussion of the application of *Speiser* to the burden of proof requirement of CPLR 9406(1); *infra*, pp. 42-48.

[35] See *Cooper's Case*, 22 N.Y. 67 (1860).

divided allegiance to the government of the United States").[36]

Appellees in their Motion to Affirm (p. 9) have conceded, although somewhat equivocally, that the requirements of CPLR 9406(1) are unconstitutionally vague on their face. This concession was undoubtedly necessitated by the force of the *Keyishian* and *Baggett* decisions and by the ruling below that the vagueness of an almost identically worded oath appearing on the questionnaire (see Question 27(a) *supra*, p. 7) and promulgated on the basis of CPLR 9406(1)[37] deterred the free exercise of First Amendment rights by prospective applicants for admission to the New York Bar. See A. 162-163. Appellees have therefore acknowledged the unreality of the effort by the majority below to distinguish the Question 27(a) oath from CPLR 9406(1) because the former contains the word "principles" and the latter does not. Furthermore the statute poses no less a danger to First Amendment rights than does the oath. It is a political test, which the applicant must satisfy, not merely by a single affirmation, but by complete disclosure of First Amendment protected beliefs and associations. See A. 199.

The imprecision of CPLR 9406(1), like the defective oath involved in *Whitehill* v. *Elkins*, 389 U.S. 54, "makes possible oppressive and capricious application as regimes change." *Id.* at 62; see also *Baggett* v. *Bullitt*, *supra* at 373; *NAACP* v. *Button*, *supra* at 432-433; *Cramp* v. *Board*

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[36] Similarly, upon the authority of *Baggett* v. *Bullitt*, *supra*, a three-judge district court in Colorado invalidated an oath requiring Colorado teachers to promise that they will "teach, by precept or example, respect for the flags of the United States and of the state of Colorado, respect for law and order and undivided allegiance to the government of one country, the United States of America." See *Gallagher* v. *Smiley*, 270 F. Supp. 86 (D.Colo. 1967).

[37] See Brown & Fassett, *supra* at 490-491 indicating that CPLR 9406(1) "is the basis for" Question 27(a).

of Public Instruction, supra at 286-287. For, as with the Question 27(a) oath, there is no reason why applicants who oppose bicameral legislatures, the electoral college or the power of this Court to invalidate Congressional enactments or who are committed to the anarchist, monarchist or communist philosophies should not genuinely fear that their views may be deemed contrary to the belief and loyalty demanded by CPLR 9406(1). See A. 162.

The constraints imposed by CPLR 9406(1) upon the exercise of First Amendment freedoms are in no way lessened and certainly not "eliminated by the interpretation of that Rule as implemented by the Committee in the questionnaire submitted to each applicant" (Motion to Affirm, p. 9). Indeed, the fears of applicants are only heightened when they realize that pursuant to CPLR 9406(1) the Committees have conducted by means of the questionnaires and personal interviews searching inquiries into unorthodox political beliefs and associations.[38]

Appellees point to their most recent questionnaire as exemplifying their narrowing *but unspecified* interpretation of CPLR 9406(1). But appellees offer no reason why the statute should be construed in light of questions in existence for only six months, and in disregard of questionnaires used for more than 20 years or of those presently employed by the Third and Fourth Departments.[39] Appel-

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[38] Doubts as to the scope of CPLR 9406(1) are hardly dispelled by the case of *Application of Rosenberg* (1968) (unreported) where an applicant's admission was delayed for three months after his personal interview during which he was compelled to state the reasons for his opposition to the war in Vietnam. This case is discussed in Note, *Inquiries Into the Political Beliefs and Activities of Applicants for Admission to the Bar*, 1 Columbia Survey of Human Rights, 33, 38 n. 27a (1968).

[39] The Third Department questionnaire contains the following political interrogatory: "17. Do you believe in the form of and are you loyal to the Government of the United States?" (con't.)

lees have not disavowed the validity of their long standing practices and in any event the mere existence of CPLR 9406(1) prevents appellees from giving assurances that their successors will not reinstitute these practices. See *Whitehill* v. *Elkins, supra*, 62.

Moreover, neither the questionnaire generally, which is designed solely to obtain information and not to erect a substantive standard for admission, nor the specific political interrogatories, which are themselves under attack for vagueness and overbreadth, even purport to define the phrase "form of government", or what is meant by "believes in . . . and is loyal to such government". Indeed, the appellees have conspicuously failed to discuss any interpretation of these terms in their Motion to Affirm or at any prior stage of this litigation.

This Court may take judicial notice (cf. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 157) of the Record in the *Stolar* case, *supra*, which includes a copy of the Fourth Department questionnaire, containing the following series of sweeping political inquiries (see the Appendix pp. 23a-24a filed in *In the Matter of the Application of Stolar, supra*):

"17. State whether there are any favorable or unfavorable incidents in your life, whether at school, college, law school, business, or otherwise, not called for by the questions answered herein or disclosed in your answer thereto? If so, state the facts fully."

"18. State whether you have participated in activities of a public or patriotic nature or in philanthropic, religious, or social services? If so, state the facts fully."

"19. Do you believe in the principles underlying the form of government of the United States?"

"20. State whether you have been or are a member of any party or organization engaged in propagating or pledged to effect changes in the form of government provided for by the United States Constitution, or in advancing the interests of a foreign country? If so, state the facts fully."

"21. Can you conscientiously, and do you affirm, without any mental reservation, that you have been and are loyal to the government of the United States?"

The Clerk's office for the Fourth Department, has, by letter and telephone confirmed the fact that these questions are presently in use.

The ephemeral nature of appellees' *present* "interpretation" is underscored by the conflicting "interpretation" given CPLR 9406(1) by the various Appellate Divisions and by the varying formulations which have been devised to replace the oath originally contained in Question 27(a). Thus appellees first offered, as a substitute, an oath reworded as follows: "Do you believe in the constitutional form of government of the United States?" (A. 217). This formulation, too, was rejected by the court below (A. 228). The question presently used is not appellees' "interpretation" at all, but that of the court below. Appellees are evidently about as uncertain as to the meaning of CPLR 9406(1) as are appellants.

Appellees' "interpretation" is constitutionally inadequate for a number of other reasons.

First, CPLR 9406(1) is so vague and ambiguous as not to be fairly or reasonably open to a limiting, plausible interpretation. See *Harrison* v. *NAACP*, 360 U.S. 167, 176; *NAACP* v. *Button*, 371 U.S. 415, 433; *Baggett* v. *Bullitt*, *supra* at 378.

Second, "it is settled doctrine that a statute trenching on freedom of association cannot be rescued from taint of unconstitutionality by administrative patchwork in order to arrive at a new statute." *Stewart* v. *Washington*, 301 F.Supp. 610, 613 (three-judge court, D.D.C. 1969). This Court's refusal to accept proferred limiting constructions to save the statutes involved in *Aptheker* v. *Secretary of State*, 378 U.S. 500, and *United States* v. *Robel*, *supra*, compels rejection of appellees' new "interpretation" of CPLR 9406(1).

Third, the recently revised questionnaire, in use in only two of New York's four judicial departments, is not an authoritative construction of CPLR 9406(1), even assuming the statute to be susceptible of constitutional definition.

This Court has required nothing less than a direct and "authoritative construction" by the state's highest court before entrusting the liberty of individuals to state authorities administering an apparently vague statutory scheme. See *Harrison* v. *NAACP, supra* at 138; *NAACP* v. *Button, supra* at 432; *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 155.[40]

2. CPLR 9406(1) also suffers from impermissible overbreadth in two principal respects.

First, it explicitly conditions the Committee's certificate and the Appellate Division's final order for admission solely upon an applicant's *beliefs.* New York has therefore chosen to tread heavily into a zone of privacy absolutely reserved to the individual. Compelling an applicant to believe in the form of government of the United States is, as Judge Motley correctly found, irreconcilable with the "constitutional axiom 'that one be permitted to believe what he will.' *American Communications Assn.* v. *Douds,* 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed 925 (1950)." (A. 197). See *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 642.

The decision below is in direct conflict with the principle reaffirmed in *Stanley* v. *Georgia, supra,* at 565 that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565. *Stanley* expressly adopts Mr. Justice Brandeis' dissenting opinion in *Olmstead* v. *United States,* 277 U.S. 438, 478, that the "makers of our Constitution . . . sought to

[40] Appellees' "interpretation" of CPLR 9406(1) is far from the "authoritative construction" required by this Court. Not only is this "interpretation" not binding on the Appellate Divisions for the Third and Fourth Departments (see *supra,* p. 35, n. 39) but as the questionnaires for those departments demonstrate the scope of political inquiry authorized by CPLR 9406(1) is neither clearly defined nor a matter of consensus among the various Appellate Divisions.

protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." As Professor Meiklejohn stated:

> "A citizen may be told when and where and in what manner he may or may not speak, write, assemble, and so on. On the other hand, he may not be told what he shall or shall not believe. In that realm each citizen is sovereign." Meiklejohn, *The First Amendment Is An Absolute,* 1961 S. Ct. Rev. 245, 257.

This principle has been consistently adhered to by the Court, see *Schneider* v. *Smith, supra* at 25; *Thomas* v. *Collins, supra* at 531; *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-304; *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 412 and 446-449 (Mr. Justice Black dissenting); *Torcaso* v. *Watkins,* 367 U.S. 488, 495-496; *Girouard* v. *United States,* 328 U.S. 61, 68; *Watkins* v. *United States,* 354 U.S. 178, 196; *Schneiderman* v. *United States,* 320 U.S. 118, 144; *Sweezy* v. *New Hampshire,* 354 U.S. 234, 266 (Mr. Justice Frankfurter concurring); *Speiser* v. *Randall, supra* at 536 (Mr. Justice Douglas concurring); *Brandenburg* v. *Ohio,* 395 U.S. 444, 450 (Mr. Justice Douglas concurring).

Second, CPLR 9406(1) is overbroad with respect to the nature of the prohibited political beliefs. It excludes from admission all applicants who do not or cannot prove that they believe in the form of government of the United States, that is, according to the majority below, that they subscribe to a belief in the "essentials, democratic government and change by lawful methods." (A. 162).

Obviously, then, the political test embodied in CPLR 9406(1) at the very least does not countenance belief in or advocacy of violent overthrow of government, though such beliefs and advocacy are unquestionably protected by the First Amendment from criminal punishment, see *Scales* v.

United States, 367 U.S. 203; *Noto* v. *United States*, 367 U.S. 290; *Yates* v. *United States*, 354 U.S. 298; *Brandenburg* v. *Ohio*, *supra* at 448-449, and from becoming the basis for a finding of moral unfitness, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; cf. *Keyishian* v. *Board of Regents*, *supra* at 607.

In predicating exclusion from the bar upon mere beliefs without distinguishing between "mere advocacy and incitement to imminent lawless action" (*Brandenburg* v. *Ohio*, *supra* at 449 n. 4), CPLR 9406(1) "sweeps within its condemnation speech which our Constitution has immunized from governmental control" (*id.* at 448).

CPLR 9406(1) is not saved from the constitutional infirmity of overbreadth by arguing, as the majority below does (A. 155), that the statute merely directs the admitting bodies to test whether an applicant can honestly take the constitutional oath of support.[41]

As Judge Motley stated (A. 207), this Court in *Bond* v. *Floyd*, 385 U.S. 116, held that First Amendment rights may not be restricted under the guise of testing the sincerity with which an individual can take an oath to support the Constitution and that the power to require such an oath "does not authorize a majority of the state legislators to test the sincerity with which another duly elected legislator can swear to uphold the Constitution." *Id.* at 132.[42]

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[41] Jud. L. § 466 requires each person, *upon being admitted to practice* by the Appellate Division, to take an oath set forth in N.Y. Const., Art. 13, § 1:

> "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ....., according to the best of my ability."

[42] See also *Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess., at p. 17 (1955). (Con't.)

New York's screening program authorizes just what *Bond* forbids; the sincerity with which an applicant can swear to support the Constitution is tested by the orthodoxy of his political beliefs and associations through an unrestricted search of his political past. This testing process is particularly noxious in the area of bar admissions because, for the most part, applicants have just completed law school and their undergraduate education during which they were encouraged to challenge and were free to reject every precept and value in our society.

The oath, as involved in this case, differs substantially from a prospective pledge of support, see *Knight* v. *Board of Regents, supra.* Here the oath, applied through the medium of CPLR 9406(1), is transformed into a retrospective loyalty test. This raises substantial questions as to whether the oath, as a test rather than a mere promise, meets First Amendment requirements of precision, see Note, *Loyalty Oaths,* 77 Yale L. J. 739 (1968). But certainly this retrospective application of the oath through CPLR 9406(1) and based on past lawful beliefs and associations violates the constitutional proscription against bills of attainder, and *ex post facto* laws. See *Ex Parte Garland,* 71 U.S. (4 Wall) 333; *United States* v. *Brown,* 383 U.S. 437.

Finally, the majority below errs by acknowledging the imprecision of CPLR 9406(1), (A. 154, 156), but then nevertheless sustaining the statute on the assumption that it will be properly implemented by appellees. This is wholly

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Appellees take a position in this case contrary to the one adopted by New York in its Motion to Dismiss or Affirm in *Knight* v. *Board of Regents,* 390 U.S. 36 *aff'd per curiam* 369 F. Supp. 339 (S.D. N.Y. 1967) where its was asserted that the constitutional oath involved merely "a promise of future conduct" (p. 7) and would not proscribe "abstract advocacy of violent overthrow of the government." (p. 10).

insufficient protection for First Amendment rights. See *NAACP* v. *Button*, *supra*, at 433, 435; *Whitehill* v. *Elkins*, 389 U.S 54, 61-62; *Smith* v. *California*, 361 U.S. 147, 151; *Speiser* v. *Randall*, 357 U.S. 513, 526. Reliance upon the self-restraint of the appellees is wholly unacceptable, see *Baggett* v. *Bullitt*, *supra* at 373-374, in this area where experience has shown that attorneys and law students are particularly susceptible to being stereotyped by the political beliefs of their clients and other attorneys with whom they associate and that, like prosecutors, those in charge of regulating the Bar, too, are human. See *Cramp* v. *Board of Public Instruction*, *supra* at 286-287; *Application of Levy*, 214 F. 2d 331 (5th Cir. 1954) *rev'd* 348 U.S. 978; *Schware* v. *Board of Bar Examiners*, *supra*; *Dombrowski* v. *Pfister*, 380 U.S. 479, 495 n. 12; *Loyalty Oaths for Lawyers: Opposition Expressed*, 37 A.B.A.J. 123, 125; see also *supra*, p. 19, n. 20.

3. CPLR 9406(1) Unconstitutionally Imposes Upon Each Applicant the Burden of Proving His Belief in and Loyalty to the Form of Government of the United States

The majority below holds that CPLR 9406(1) does not unequivocally place the "true" burden of proving loyalty on the applicant, and that if it does, such a burden is not unconstitutional (A. 152).

1. The first holding is contradicted by the statute's wording which in contrast to the statutory provision considered in the second *Konigsberg* case is clear in this regard.[43] The leading commentators on the CPLR have stated that

> "every qualified applicant does have a right to practice law but that it is entirely appropriate to require him to prove his qualifications. The Court is justified

[43] Cal. Bus. & Prof. Code § 6064.1 merely provided that no person may be certified for admission to the California Bar "who advocates the overthrow of the Government of the United States or of this State by force, violence or other unconstitutional means."

in placing the burden on the applicant to reveal all his activities and associations." 8 Weinstein, Korn, Miller, *New York Civil Practice* § 9404.05 (1968).

There is no indication that the authors of CPLR 9406 intended to exempt subsection (1) dealing with belief in and loyalty to the form of government from the full burden of proof requirement unquestionably applicable to subsections (2)-(4) dealing with citizenship, residence and the other statutory and regulatory qualifications.[44]

The ruling of the majority below is inconsistent with its own finding that CPLR 9406 implements the good moral character and general fitness requirements of Jud. L. § 90(1)(a) and Rule VIII (A. 145). The direction of 9406 that an applicant "shall furnish satisfactory proof" undeniably places the full burden of proving good moral character and general fitness on the applicant.[45] There is no basis for finding that the same phrase is equivocal as to

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[44] See *Matter of Lober*, 5 A.D. 2d 789 (2d Dept. 1958) [admission denied for failure to furnish satisfactory proof of New York residence for six months prior to filing application, as required by CPLR 9406(3)]; *Application of Schiff*, 163 N.Y.S. 2d 382 (2d Dept. 1958) (same); *Application of Kerno*, A.D. 2d 972, 151 N.Y.S. 2d 29 (2d Dept. 1956) (same); *Application of McDonough*, 280 App. Div. 866, 113 N.Y.S. 2d 781 (2d Dept. 1952) (same); *Application of Darter*, 6 A.D. 2d 696, 174 N.Y.S. 2d 335 (2d Dept. 1958) (admission denied for failure to prove five years practice in state of prior residence, as required by Rule VII of the Rules of the Court of Appeals, Jud. L. App.); *Matter of Harvey*, 309 N.Y. 46 (1955) (same).

[45] See *Konigsberg* v. *State Bar*, 366 U.S. 36, 40-41, n. 4; *Application of Appelman*, 280 App. Div. 865; 113 N.Y.S. 2d 780 (2d Dept. 1952); Weinstein, Korn, Miller, *supra;* Carmody-Forkosch, *New York Practice* § 76 p. 64 (8th Ed. 1963).

That applicants bear the burden of proof of good moral character was expressly acknowledged at p. 64 of the brief submitted by the Attorney General of New York in *Willner* v. *Committee on Character and Fitness*, 373 U. S. 96.

the burden of proof for belief in and loyalty to the form of government.[46]

But no matter how the burden is formulated,[47] the pressures on the law student or applicant to "steer far wider of the unlawful zone" (*Speiser* v. *Randall*, *supra* at 527) are overpowering. That is because he understands that the men before whom he must bring forth "satisfactory proof" of the morality and lawfulness of his political associations and beliefs are men who have his professional reputation and career in their hands and who are very likely to be out of touch with, if not hostile to, contemporary political and social movements.[48]

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[46] See *The Proposed Anti-Communist Oath: Opposition Expressed*, 37 A.B.A.J. 123, 124; Weinstein, Korn, Miller, *supra*; cf. *Matter of Brennan*, 230 App. Div. 218, 228, 243 N.Y.S. 705 (2d Dept. 1930).

[47] The appellees and the court below contend that the burden is "merely one of initially coming forward with some evidence" (Motion to Affirm, p. 9). This extraordinarily vague formulation, even if equated with the standard of a prima facie case, is indistinguishable in effect from the burden of proof requirement invalidated in *Speiser* v. *Randall*, *supra*. Here, as in *Speiser*, the applicant's proof of loyalty is subject to rebuttal which shifts to the applicant the ultimate burden of proof. Cf. *Konigsberg* v. *State Bar*, 366 U.S. 36, 40-41 n. 4 and 80-81 (Mr. Justice Brennan dissenting).

[48] This Court may take judicial notice of the fact that the membership of the Committees does not represent a racial, economic, age, social, or political cross-section of the community. Many, if not most, are members of the "established" Bar which has been sharply criticized for political conservatism in the past by men such as Erwin Griswold and Chief Justice Stone and recently by law students in major schools throughout the country. See Griswold, *The Legal Profession in the United States*, 25 (1965); Stone, *supra*; *Roberts*, *supra*, 14 Villanova L. Rev. at 377; *Weckstein*, *supra* at 267, 270-271; see also *supra*, p. 18, n. 17. The existing gap in experience and values between the Committees and applicants will become more menacing as the number of law students from minority groups increases. See *N. Y. Times*, p. 11, col. 2 (Aug. 30, 1969); "Boycott Affects Yale Law School", *N. Y. Times*, p. 52, col. 1 (Oct. 29, 1969).

JudgeMotley accurately pointed to the burden of proof requirement in CPLR 9406(1) as the "heart" of the case (A. 199). This requirement provides the mechanism for appellees' practice of selectively intensifying the political interrogation for those applicants whose political associations and beliefs do not conform to appellees' standard of orthodoxy.

Thus, appellees may fasten upon a controversial association or belief disclosed by the applicant or discovered by the Committee's independent investigation as a basis for a finding that the applicant has not *yet* met his burden.[49] Compare *Konigsberg* v. *State Bar*, 366 U.S. 36, 75-76 (Mr. Justice Black dissenting). As a consequence of such a finding the applicant is compelled to explain in detail and to fully justify those associations or beliefs in an attempt to exorcise any doubts engendered in the Committee re-

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[49] Two recent cases provide alarming illustrations of appellees' discriminatory application of the burden of proof requirement.

One involved the appellant Kaimowitz who submitted his application after the decision below. He was prevented from being admitted with his class of applicants in June, 1969 and was instead subjected to further hearings and intensive interrogation before he was ultimately admitted on December 18, 1969 by the Appellate Division, Second Department, over the Committee's adverse recommendation. The sole bases for his being singled out for delay and intrusive inquiry were (1) his joining several other writers in 1964 in a strike against their employer, a magazine, over differences on editorial policy; (ii) his participation in 1965 with other summer instructors employed by the Southern Teaching Program sponsored by Yale University in an on-campus, peaceful assembly to protest the educational policies of Bishop College, an all-black institution located near Dallas, Texas, to which they were assigned; and (iii) his objection to Canon 16 of the now superseded Canons of Ethics on the grounds that in requiring an attorney to terminate his relationship with a client who persists in courtroom misconduct the Canon violates the Sixth Amendment. Based on the latter two matters, the Committee concluded that Kaimowitz had failed to establish his fit-

garding his political fitness.[50] The effect of this is to impermissibly impose the burden on the applicant of proving the legality of these associations. See *Dombrowski* v. *Pfister, supra* at 494-496; *Hasket* v. *Washington*, 294 F. Supp. 912, 915, 916-917 (D.D.C. 1968) (Wright, J. concurring).[51]

This procedure, with its potential for arbitrary suppression of political liberties, prompted Judge Motley's conclusion that

> "[t]he burden of proving loyalty here, as in *Speiser*, can have but one effect on a prospective lawyer's First Amendment freedoms; and that is a chilling effect if not a freezing one." (A. 220, see also A. 201).

2. The majority's alternative position is an unsuccessful attempt to avoid the force of *Speiser* v. *Randall, supra*. It argues that unlike, applicants for tax exemption, candidates for admission are seeking a "public position by virtue

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ness. The order of the Appellate Division admitting Kaimowitz is unreported. Prior to that order a motion made to the court below (Rec. Doc. No. 29) seeking its intervention was denied on the basis of paragraph 6 of its Judgment (A. 228).

The second case involved an applicant who was also singled out for delay and further investigation by the Committee for the First Department as a result of a personal interview during which the applicant's disclosure of his participation in anti-war marches prompted the Committee to compel him to state the reasons for his opposition to the war in Vietnam. After a three-months delay the applicant was admitted. See *Application of Rosenberg* (1st Dept. 1968) (unreported). See *supra*, p. 35, n. 38.

[50] Question 26 (*supra*, pp. 10-11) is another good example of this practice. An affirmative answer to subsection (a), without more, automatically places upon the applicant the burden of explaining to the Committee's satisfaction that his was lawful association. See *infra*, p. 61.

[51] This procedure was the subject of Circuit Judge Wright's concurring opinion in *Hasket* v. *Washington, supra*. Judge Wright held that teachers refusing to swear to an oath of non-membership in organizations advocating violent overthrow could not constitutionally be compelled to bear the burden of rebutting an adverse presumption arising from such refusal.

of which they could, if evilly motivated, create serious danger to the public." A. 152 quoting from *Speiser* v. *Randall, supra* at 527.

But the premise of this argument has been thoroughly rejected by this Court. States may not condition governmental employment, licenses or benefits of any kind on the surrender of First Amendment rights. See *Keyishian* v. *Board of Regents, supra* at 605-606; *United States* v. *Robel, supra* at 264-266; *Schware* v. *Board of Bar Examiners, supra* at 239; and see Reich, *The New Property*, 77 Yale L. J. 773 (1963); Van Alstyne, *The Demise of the Right-Privileged Distinction in Constitutional Law*, 81 Harv. L.Rev. 1439 (1968).[52] Nor is this case distinguishable from *Speiser* because infringement of First Amendment rights here is an unintended and incidental result of state regulation of the Bar. "For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP* v. *Button, supra,* at 439; *Konigsberg* v. *State Bar*, 353 U.S. 252, 269; see also *Shelton* v. *Tucker*, 264 U.S. 479, 488-489.

A member of the Bar is not a public employee or official. See *Ex parte Garland, supra* at 378; *Spevack* v. *Klein*, 385 U.S. 511. He does not represent the government or the administration of justice in the course of his profession.[53]

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[52] *Garner* v. *Board of Public Works*, 341 U.S. 716; *Gerende* v. *Board of Supervisors*, 341 U.S. 56, and *American Communications Association* v. *Douds*, 339 U.S. 382 were distinguished in *Speiser* v. *Randall, supra* at 27. To the extent that these cases may have been thought to support the position of the majority below, we believe that they have been overruled in cases decided since *Speiser*. See *Keyishian* v. *Board of Regents, supra; United States* v. *Brown, supra; Whitehill* v. *Elkins, supra.*

[53] One of the "significant omissions" in the newly adopted ABA Code of Professional Ethics found by a leading commentator involves Canon 7 of that Code, declaring that "[a] lawyer should represent a client zealously within the bounds of law". He found that

> "[n]owhere in the [new] Canons, in the disciplinary rules, or in the ethical consideration have I found the phrase 'minister

Indeed, he frequently stands as a protective barrier between the Government and his client. At times he may be required to defy a court order or violate or recommend the violation of a law or border upon contempt where he in good faith believes it to be the only way he can protect his client's constitutional rights.

Nor is there any support in experience or logic for the majority's assumption that *lawyers, as such,* pose a particular threat to the public safety. See discussion, *supra,* pp. 21-26. Even supposing that certain dangers exist, they are undoubtedly only a remote possibility. Therefore, New York may not protect its courts or the public by placing the burden of proving loyalty upon applicants or by employing other methods which deter the exercise of First Amendment rights where there is a less restrictive alternative available. See *supra,* p. 30. As Judge Motley found below, criminal and disciplinary sanctions afford just such a precise, narrow and wholly adequate means of protection (A. 204). See also *Konigsberg* v. *State Bar,* 344 P. 2d 777, 780, 782 (Traynor, J., dissenting); *Brown* v. *Fassett, supra,* at 505-508.[54]

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of the law' [old Canon 32] or 'officer of the law' [old Canon 22] or other similar phrase characterizing the lawyer's relationship to the legal system that might raise a question of a competing or even overriding standard, when the lawyer is attempting to define the kind of conduct on behalf of his client that falls 'within the bounds of the law'." Thode, *Canons 6 and 7: The Lawyer-Client Relationship,* 48 Tex. L. Rev. 367, 371 (1970).

[54] In rejecting loyalty oaths for screening the political fitness of members of and applicants to the Bar, the Association of the Bar of the City of New York concluded:

> "The existing means of discovering and punishing illegal or professionally improper conduct, by presenting specific charges and supporting evidence, are ample . . . to meet any danger to our government or disgrace to our profession." *The Proposed Anti-Communist Oath: Opposition Expressed,* 37 ABA J. 123 (1951). (Con't.)

**Applied, New York's Stautory Scheme Vio-
es the Rule of Precision by Authorizing a
eeping Political Inquiry Without Probable
use and Without Other Sensitive Procedural
ols**

e appellees have created an investigational apparatus
lacking "sensitive tools" (*Freedman* v. *Maryland*,
S. 51, 58; *Speiser* v. *Randall, supra* at 525) designed
iate the dangers of political inquiry.

political fitness is a relevant criterion for admission
political screening program is a permissible method
termining that fitness, then it is imperative that the
atus implementing this program incorporate suffi-
precise standards and procedures to ensure that
ocess of regulation does not itself abridge freedom
ression and destroy the very interests which it has
nstituted to protect. Appellees' investigational ap-
s fails to meet the constitutional requirement of pre-
because (a) applicants with controversial or unortho-
olitical associations may be discriminatorily singled
r intensive interrogation and delayed admission, (b)
pplicant is compelled to divulge his political past
e the absence of any basis in the record or probable
to believe that he has engaged in unlawful political
ies and (c) the political interrogatories on the ques-
ires and the scope of inquiry permitted by the "home
ffidavits and personal interviews unreasonably deter
ants from exercising their First Amendment rights.

956, a Special Committee on the Matter of Communist Law-
the Committee on Grievances of the same Association re-
a proposal that persons who are Communists be excluded
dmission to the bar. The conclusion again was that ample
ons are afforded by disbarment remedies for "lawyers en-
n Communist activities contrary to their oaths to uphold the
ation." This view was concurred in by the distinguished
nt of the Association, Allen T. Klots and adopted by the
tion. See 11 *The Record of the Association of the Bar of
of New York*. 45-47 (1956).

a. *The power to discriminatorily intensify the investigation and delay admission*

There are no procedural or substantive checks on the breadth or depth of the appellees' inquiry; each applicant is subject to a limitless and roving search of his political life. Akin to a general warrant, appellees' investigatory license sanctions an indiscriminate search based on their political biases and predilections.

Appellees, freed from formal or informal restraints, reward those applicants whose political orthodoxy conforms to that of their own and penalize non-conforming applicants with intensive political examination. Thus an affirmative answer to question 26(a) or an unorthodox association, belief or activity disclosed in the various other interrogatories on the questionnaire, in response to oral questioning during the personal interview, or by third-party affiants or discovered by the Committee's independent investigation may trigger prolonged investigation, unlimited and indiscriminate political interrogation and extensive delay in the final determination of an applicant's qualifications.

"It is clear", commentators on CPLR 9406(1) have concluded,

> ". . . that the applicant may be questioned about his affiliations with any group which might be considered subversive. He must reveal fully his views and past associations." *Weinstein, Korn, Miller, supra* ¶ 9406.03

In contrast to the unobstructed road to admission facing an applicant whose associations could not possibly be considered "subversive" and whose political activities, by their orthodoxy, only serve to fortify his showing of belief in the form of government, the applicant who reveals controversial associations or activities is subjected to probing interrogations pursuant to unspoken accusations. For the latter class of applicants the undirected inquiry is automatically transformed into an accusatory proceeding in

which the applicant must prove the lawfulness of his associations or disprove the appellees' assumption of the unlawfulness of the organizations involved.

At this point, the inquiry begins to feed on itself. In response to interrogation or in a self-exorcising effort to disclose every facet of his association an applicant may reveal radical beliefs and speech abrasive to appellees' concept of belief in and loyalty to the form of government.

As a result new and broader areas are opened for appellees' unhesitating exploration. As Chief Justice Traynor put it,

> "Inquiry on the issue of advocacy of the unlawful overthrow of government is a greedy camel; it does not easily take its leave. It has a way of moving on into the domain of lawful economic and political beliefs, speech and activity." *Konigsberg* v. *State Bar,* 344 P. 2d 777, 780, 782 (dissenting opinion).

This practice has the "substantial deterrent effect" against which Mr. Justice Black warned in his dissenting opinion in the second *Konigsberg* case:

> "If every person who wants to be a lawyer is to be required to account for his associations as a prerequisite to admission into the practice of law, the only safe course for those desiring admission would seem to be scrupulously to avoid associations with any organization that advocates anything at all somebody might possibly be against, including groups whose activities are constitutionally protected under the most restricted notion of the First Amendment. And, in the currently prevailing atmosphere in this country, I can think of few organizations active in favor of civil liberties that are not highly controversial." 366 U.S. at 73-74.

Mr. Justice Black's warning applies equally to the many law students, applicants and young lawyers working for federally funded organizations providing legal services

for the poor. To begin with, these organizations have not generally received a favorable welcome from the local commercial Bar.[55] Furthermore, as the poor have become more militant and politically active, their cause has become more controversial.[56]

In this setting the newly proposed rules of the Appellate Division First Department governing organizations and associations providing legal services for the poor [see Jud. L. § 495(5)] is particularly threatening. Thus subsection (d) of section 608.8 of these proposed rules entitled "Annual Reports and Contents Thereof" requires such an organization to set forth the nature of its programs and circumstances of its services which have involved law students and the names and addresses of such law students.

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[55] Smith, *Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available"*, 48 Tex. L. Rev. 285 (1970); Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 Harv. L. Rev. 805, 843-845 (1967); Comment, *OEO Legal Services Program Unacceptable to New York Court*, 66 Mich. L. Rev. 389 (1967).

[56] Thus the legal services unit of an O.E.O. sponsored organization in Newark, New Jersey was accused and, after investigation, finally exonerated of improper involvement in the ghetto uprising in 1967. See *N. Y. Times*, p. 43, col. 5 (Dec. 16, 1967); see also "Houston to Avoid Rights Legal Aid", *N. Y. Times*, p. 32, col. 3 (Sept. 20, 1966); "Rebel Rights Aid Forced To Resign", *N. Y. Times*, p. 1, col. 7 (Oct. 2, 1969).

In New York City, federally funded organizations and the appellant organizations have provided legal services to blacks and Puerto Ricans living in ghetto areas who have engaged in rent strikes, welfare center sit- ins and school boycotts. They have also provided legal assistance to the poor fighting for community control of public schools, probably the most politically inflammatory issue in the city's history. Other examples involve legal aid to the students who participated in the protest demonstrations at Columbia University in 1968 and to a group of young Puerto Ricans who recently occupied a church which refused to allow the group to use part of its premises for free breakfasts for poor children in the neighborhood.

Subsection (e) of the same section requires the organization to make the following report:

> "Where the legal services involved representation of persons or advocacy in connection with social, economic, civil rights, reform or group programs, movements, goals or protests, there should be included a statement of the nature of the program, project or protest involved and the results sought to be achieved, together with a statement of the nature of the interest or involvement of the corporation, association or organization in the particular program, project or protest, including a specification of its work and activities in the particular matter during the reporting period." [57]

With reputation and employment opportunities, not to speak of the right of political privacy, at stake," [i]t would be a bold [attorney or prospective attorney] who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery." *Keyishian* v. *Board of Regents, supra* at 601.

b. *The Absence of Probable Cause*

New York's statutory scheme authorizes invasion of an applicant's personal and political privacy without probable cause or foundation for inquiry.

This is precisely the kind of inquiry against which the Fourth Amendment is directed. For the constitutional prohibition of unreasonable searches and seizures has its historical roots in the investigations of political and religious dissenters—a situation similar to the present problem—at least in the political field. *Boyd* v. *United States,* 116 U.S. 616, 625-628; *Stanley* v. *Georgia, supra* at 598-599 (Mr.

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[57] These rules also prohibit, unless specifically authorized by the Appellate Division, the regulated organization or association from "engag[ing] in any political, lobbying, or propagandistic activities in behalf of any person, association or group of persons or furnish the services of an attorney for such purposes." See § 608.7(d).

Justice Stewart concurring). As Mr. Justice Stewart pointed out in *Stamford* v. *Texas*, 379 U.S. 478, 482, the roots of the Fourth Amendment "go far deeper" than the general warrants of the pre-revolutionary period in this country or in England. They are to be found in the Tudor period where "officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent . . ."

The purpose of the Fourth Amendment was to safeguard the security of individuals against such arbitrary invasion by government officials, particularly in the religious and political areas, clearly the most sensitive to such abuse. The method imposed by the Constitution was the requirement of a warrant based upon probable cause or other reasonable basis for making such an inquiry in a particular case. The issue has been the subject of litigation most frequently in areas of criminal investigation unrelated to the First Amendment. This is for a variety of reasons, including the relative recency of the application of the First Amendment to the States (see *Gitlow* v. *New York*, 268 U.S. 652) and of the incorporation of the search and seizure provisions of the Fourth into the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643.

It is obvious, however, in the light of Anglo-American history, that the principles underlying the Fourth Amendment's proscription of unreasonable searches and seizures should be applied most liberally for the protection of the citizen in the area of the First Amendment. Cf. *Katz* v. *United States*, 389 U.S. 347, 350 n. 5. If this is true where even limited disclosures of political associations or activities are involved (see, *e.g.*, *Gibson* v. *Florida Legislative Committee*, *supra*), it is even more important to apply the rule where, as here, the demanded disclosures are virtually unlimited.

The few cases involving admission to the Bar which have reached this Court have not directly adjudicated this

issue; it appears neither to have been directly raised nor was there an adequate basis for doing so. Thus, in the second *Konigsberg* case the inquiry was a limited one relating to membership in a single named political organization; the committee had independent evidence on the subject and the Court noted "gaps in the evidence presented" by the applicant, *supra* at 45. In the *Anastaplo* case, *supra,* where the applicant appeared *pro se,* the Court again was dealing with Communist Party membership, and referred to the committee's "good faith belief in the need for exploratory or testing questions of the applicant," *id.* at 90. We note these distinctions not to indicate acquiescence in an inquiry with respect even to Communist Party membership, but because it is a distinction which the Court has regarded as material.

Passing the earlier Bar cases, which cast little light upon the issue as it is squarely posed here, the application of the "probable cause" principle to this case is not only consistent with the decisions in the basic search and seizure cases but with this Court's decisions in cases involving other types of governmental investigation into associations.

The point was made most explictly in an earlier decision of this Court in *Barenblatt* v. *United States, supra* at 134, where Mr. Justice Harlan, after reciting evidence establishing contemnor's membership in the Communist Party, stated:

> "Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking any probable cause for belief that he possessed information which might be helpful to the Subcommittee."

Subsequently, in *Gibson* v. *Florida Legislative Committee, supra* at 537, the Court prohibited an invasion of associational privacy in the absence of "an adequate foun-

dation for inquiry."[58] Such a foundation, said the Court "is an essential prerequisite to demonstrating the important, substantial and subordinating state interest necessary to sustain its right of inquiry . . .," *id.* at 553; the dissenting opinion in that case did not question this general principle but differed as to whether a foundation had not, in fact, been laid by the Committee's witnesses, *id.* at 578. Mr. Justice Douglas, concurring, stated:

> "Whether the problem involves the right of an individual to be let alone in the sanctuary of his home or his right to associate with others for the attainment of lawful purposes, the individual's interest in being free from governmental interference is the same, and, except for the limited situation where there is 'probable cause' for believing that he is involved in a crime, the government's disability is equally complete." *Id.* at 569.

Such a foundation, this Court has held, must be established upon independent,[59] relevant [60] and substantial [61] evidence. *Cf. Uphaus* v. *Wyman*, 360 U.S. 72, 79.

This case is an even stronger one than *Gibson* for requiring an adequate foundation. The respondents are not merely collecting data for future legislation; they are possessed of an adjudicatory power to determine whether an applicant has engaged in unlawful political conduct. See *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96. Since a proceeding which involves such a determination is by its nature accusatory—the applicant is the target of

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[58] In addition to the term 'foundation," the Court characterized the requirement by such descriptive terms as "nexus" and "probable cause," *Gibson* v. *Florida Legislative Committee*, *supra* at 545.

[59] *Sweezy* v. *New Hampshire*, *supra* at 255, 261 (Mr. Justice Frankfurter and Harlan concurring).

[60] *De Gregory* v. *New Hampshire Attorney General*, *supra*, 830.

[61] *Gibson* v. *Florida Legislative Committee*, *supra* at 555, 556 and n. 7; *Speiser* v. *Randall*, *supra*, 529.

investigation—absence of an adequate foundation violates the applicant's due process rights to notice of charges and to confrontation.[62] *Cf. In re Ruffalo*, 390 U.S. 544, 550-551; *Jenkins* v. *McKeithen*, 395 U.S. 411.

The unjustified and unwarranted intrusion into the privacy of applicants would be a novel doctrine even if this case involved the most compelling state interests—public health and public safety; see *Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *Seattle*, 387 U.S. 541; *Katz* v. *United States*, *supra*; *Mapp* v. *Ohio*, 367 U.S. 643. Admission to the Bar does not, however, involve any comparable damage to the state. On the contrary, the danger is to the subject of the search, who has been and is subjected by this intrusion to a prior restraint in the exercise of his First Amendment rights. See *Marcus* v. *Search Warrant*, 367 U.S. 717; *A Quantity of Books* v. *Kansas*, 378 U.S. 205; *Freedman* v. *Maryland*, 380 U.S. 51; *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 155 n. 4, 159 (Mr. Justice Harlan concurring).

c. *Appellees are authorized to conduct a sweeping and indiscriminate investigation of an applicant's personal and political life*

1. The breadth of the appellees' investigatory power as authorized by New York's statutory scheme "pass[es] the outermost bonds of reason." *Schneider* v. *Smith*, *supra* at 25 (Mr. Justice Fortas concurring). The inquiry, oral or written, and conducted under the threat of perjury prosecution or delay or denial of admission, may delve into any area, political, social, religious, professional, family, sexual or otherwise. (See A. 172-184); *Application of Brennan*,

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[62] In due process terms, there is no logical distinction between disbarment and denial of admission; both affect substantial, legal interests of the individual. See *In re Ruffalo*, 390 U.S. 544; *Hallinan* v. *Committee of Bar Examiners*, *supra*; *cf. Greene* v. *McElroy*, 360 U.S. 474; *Schneider* v. *Smith*, *supra* at 25; *Speiser* v. *Randall*, *supra* at 425-526; *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191.

supra; 8 Weinstein, Korn, Miller, *supra* at ¶¶ 9404.04-9404.06; Brown & Fassett, *supra* at 492-495; Jackson, *Character Requirements for Admission to the Bar*, 20 Fordham L. Rev. 305, 316 (1961).[63]

Such a sweeping survey of an applicant's life, as this one authorized by the New York statutory scheme, violates the constitutional safeguards of personal and political privacy and deters the free exercise of First Amendment rights. It rounds up more information than is relevant or material to any legitimate state interest and touches many areas in which the state has no interest at all. See *Shelton* v. *Tucker, supra; Schneider* v. *Smith, supra; NAACP* v. *Alabama, supra; Bates* v. *Little Rock*, 361 U.S. 516; and *supra*, pp. 38-40.

2. Similarly, the particular questions sustained by the court below, Questions 26 and 27(a) (*supra*, pp. 10-11) as revised and Question 27(b) (*supra*, p. 7) in its original form, constitute an unwarranted invasion of the applicant's political privacy.

Revised Question 27(a), like Question 31 (*supra*, p. 7) requires the applicant "to engage in soul-searching of his

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[63] As Judge Motley (A. 172-184) illustrates, until recently the questionnaires specifically required each applicant to disclose *every* association, belief, speech, published writing and activity of *every* kind which he had ever made, held or been engaged in during his lifetime. Applicants were also required to write 100 word essays under oath on what they believe to be the "principles underlying the form of government of the United States." Compare Mr. Justice Fortas' concurring opinion in *Schneider* v. *Smith, supra* at 27.

In addition, after the commencement of these actions, appellees began to issue a form letter to applicants, who were required to fill in the address of their draft boards and to sign it before a notary public. The letter authorized any of the appellees or their agents to have access to the applicant's Selective Service file for examination and copying. The majority noted "considerable doubt about the propriety of this" but refused to pass upon it because this practice was not specifically alleged in the complaints (A. 168, n. 9) although clearly within their scope.

entire past life", see *supra*, p. 11. The self-exorcism demanded by 27(a) is all the more pernicious because of its focus on political beliefs.

This question also is a test oath which violates the constitutional proscriptions against vagueness and against *ex post facto* laws and bills of attainder.

The oath contained in Question 27(a) forbids an applicant to have "any mental reservation" regarding his support of the Constitution. It suffers from the same constitutional deficiencies as subsection (a) of Question 27 because its unmistakeable purpose is the suppression of political *beliefs*. See also *supra*, pp. 38-42.

Subsection (a) of Question 26 alone sweeps more broadly into associational privacy than the interrogatories rebuked by the Court in *Schneider* v. *Smith*, *supra*. In contrast to the relatively limited inquiry, involved in *Schneider* concerning membership in 250 organizations, Question 26(a) seeks an applicants' affirmation or denial of any association, no matter how stale,[64] with an unlimited number of organizations (lawful and unlawful) whose purposes he must guess at his peril.

The Court's conclusion in *Shelton* v. *Tucker*, *supra*, at 490 is equally applicable to Question 26(a)'s sweeping inquiry, for it plainly constitutes a "comprehensive interference with associational freedom [which] goes far beyond what might be justified in [or remotely relevant to] the exercise of the State's legitimate inquiry into the fitness and competency" of applicants to its Bar.

Question 26(a) suffers from other constitutional infirmities in addition to the invalidity under *Shelton* v. *Tucker*, *supra*, and *Schneider* v. *Smith*, *supra*.

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[64] See *DeGregory* v. *New Hampshire Attorney General*, *supra*. This Court had occasion to consider a related aspect of staleness—that relating to the possibly changing purposes of organizations. *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board*, 380 U.S. 513.

First, the question is not restricted in its inquiry to organizations whose advocacy or teaching "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." See *Brandenburg* v. *Ohio, supra*, at 447 and n. 2, 448-449. Question 26(a) therefore fails to meet the requirement that "[s]tatutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitment to imminent lawless action." *Id.* at 449 n. 4.[65]

Second, another serious deficiency in Question 26(a) involves the terms "advocating", "teaching" and "any unlawful means" which are too vague.

The ambiguity in the terms "advocating" or "teaching" of governmental overthrow is comparable to the ambiguity in the terms "advocates, advises or teaches the doctrine" of forceful overthrow, found to be unconstitutionally vague in *Keyishian* v. *Board of Regents, supra*, at 599-601. Question 26(a) may well be taken by appellees to require an applicant to disclose membership in an organization which "merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims." *Keyishian* v. *Board of Regents, supra* at 599-600.

The term "any unlawful means" [contained in both subsections (a) and (b) of Question 26] is particularly imprecise. See *Boyle* v. *Landry*, 280 F. Supp. 938, 955 (N.D. Ill. 1968); *Stewart* v. *Washington, supra* at 613. On its face it covers a myriad of offenses, some only misdemeanors or administrative violations. The element of vio-

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[65] Likewise, subsection (b) of Question 26 fails to take into account the factor of "imminent danger" or "clear and present danger" without which specific intent to further an organization's illegal aims is not criminal. See *Brandenburg* v. *Ohio, supra; Yates* v. *United States*, 354 U.S. 298, 321-322.

lence is not necessarily included; nor are all "unlawful means" imbued with the quality of moral turpitude.[66]

Third, an affirmative answer to 26(a) immediately requires the applicant to give a full and detailed explanation of such membership, and against the background of this explanation, answer subsection (b)'s query into "specific intent". In effect, admission of mere knowing membership creates, without more, a presumption or substantial inference of unlawful membership which the applicant bears the burden of disproving to the Committee's satisfaction. See Mr. Justice Black dissenting in the second *Konigsberg* case, 366 U.S. at 76. This quite naturally leads to a thorough review of the applicant's beliefs and entire political background.

This procedure has two principal defects:

(i) A presumption or substantial inference of unlawful membership derived from the mere fact of knowing membership is irrational and the applicant may not be constitutionally required to bear the burden of rebutting it.

The presence of First Amendment considerations requires strict application in this case of the principle announced in *Tot* v. *United States*, 319 U.S. 463 that a "presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed." *Id.* at 467-468. Cf. *Speiser* v. *Randall, supra.* Appellees' presumption has been undercut by this Court's declaration that it is "an assertion of arbitrary power" (*Wieman* v. *Updegraff*, 344 U.S. 183, 191) to automatically infer, as appellees have, "that all knowing members of the Communist Party, for example, share its illegal purposes or participate in its illegal conduct." *Schware* v. *Board of Bar Examiners, supra* at 245; See also *United States* v. *Robel,*

[66] It should also be noted that "membership" in or "association" with an organization advocating violent overthrow is a notoriously subjective concept. See *Killian* v. *United States*, 368 U.S. 231.

supra at 266 n. 16; *United States* v. *Brown, supra* at 456. Further as the Court stated in *Schneiderman* v. *United States*, 320 U.S. 118, 136:

> "Under our traditions, beliefs are personal and not a matter of mere association, and men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms of asserted principles."

In light of these findings, it plainly strains "the circumstances of life as we know them" (*Tot* v. *United States*, *supra* at 468) to find a taint, as have appellees, on every applicant who answers 26(a) affirmatively. Cf. *Boorda* v. *Subversive Activities Control Board*, — F. 2d — (D.C. Cir., decided Dec. 12, 1969).

(ii) Appellees' determination that an organization unlawfully advocates or teaches violent overthrow is not the product of an actual review of the organization's history or purposes made under the procedural safeguards demanded by *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123. Appellees, therefore, are free to assume that advocacy of violent overthrow is the purpose of any number of organizations; an assumption obviously influenced by the controversial nature of an organization or their own or some other governmental agency's political biases.[67]

Thus an applicant must take his chances in answering Question 26(a) that his evaluation of an organization's purposes coincides with that of the appellees'. In these circumstances an applicant must chose between over-disclosure or the unachievable: making certain, beforehand, that none of his associations could conceivably fall under the question's purview. Cf. *Speiser* v. *Randall, supra* at 526.

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[67] Prior to its revision in June, 1968 the First Department questionnaires directed applicants to affirm or deny membership in organizations listed as subversive by the Attorney General of the United States (A. 56).

Moreover, an applicant may not rationally be required to bear the burden of demonstrating the lawful character of an organization to which he belongs, where there is no evidence or support for appellees' assumption that it encompasses unlawful purposes.

An analogous procedure was considered in *Dombrowski* v. *Pfister*, 380 U.S. 479 and held invalid. In contrast to appellees' open-ended and fluctuating "designation" of organizations advocating violent overthrow, *Dombrowski* concerned the comparatively narrow list of Communist-front organizations compiled by the Attorney General of the United States, the Subversive Activities Control Board and the committees and subcommittees of Congress. Appellants in *Dombrowski* sought invalidation of a Louisiana statute creating criminal penalties for failure to register as a member of a Communist-front organization as defined by another statutory provision. Listing by the foregoing agencies was made presumptive evidence that an organization was a Communist-front; the presumption was not limited to organizations cited after compliance with the requirements of *Anti-Fascist Committee* v. *McGrath*, *supra*. The Court ruled that:

> "A designation resting on such safeguards is a minimum requirement to insure the rationality of the presumptions of the Louisiana statute, and in its absence, the presumptions cast an impermissible burden upon the appellants to show that the organizations are not Communist fronts." *Dombrowski* v. *Pfister*, *supra* at 496.

The same irrationality inheres in Question 26(a). In the absence of a prior determination made under the procedural safeguards outlined in *Anti-Fascist Committee* v. *McGrath*, *supra*, appellees may not reasonably presume that an organization in which an applicant held or holds membership advocates violent overthrow; nor may they reasonably compel the applicant to establish the lawful character of that organization.

3. The surveillance of an applicant's "home life" through third-party affiants clearly affronts the constitutional right to personal privacy. See *Griswold* v. *Connecticut*, 381 U.S. 479; *Stanley* v. *Georgia*, *supra*; *Katz* v. *United States*, *supra*.

> "The state simply cannot ask every affiant who supports an applicant for admission to the bar with whom the applicant lives or what the inside of his parents' home is like." (A. 196, Motley, J.).

Given the breadth of the appellees' stated interest in "a man's general experience in life, his family life, his associates, his business or other experience, his general reputation and the like" (*Matter of Brennan*, *supra* at 227) and its specific implementation in past and present third-party affidavits (A. 172-176 and *supra*, pp. 8-9), it is apparent that the roving search authorized here even surpasses the sweeping inquiry condemned in *Shelton* v. *Tucker*, *supra*.

Overall, New York's complex scheme governing admission to the Bar, like the State's similarly "complicated and intricate scheme" for ferreting out disloyal teachers condemned in *Keyishian* v. *Board of Regents*, *supra*, is by the "very intricacy of the plan and the uncertainty as to the scope of its proscriptions . . . a highly efficient *in terrorem* mechanism." *Keyishian* v. *Board of Regents*, *supra*, at 601, 604.

D. The Power to Judge the Morality of an Applicant's Political Activities Can Never be Adequately Circumscribed to Avoid Abuse

We believe that infringement of the First Amendment rights of applicants is not so much the fault of appellees as it is the unavoidable consequence of their undertaking. For there is substantial question as to whether the power to determine political fitness can ever be delegated and administered with constitutional precision. In *Schware* v. *Board of Bar Examiners*, *supra*, this Court found that

the standard for political disqualification requires a finding of moral turpitude in connection with illegal political conduct. *Id.* at 242-243. The difficulty in defining or implementing this standard is compounded by the further requirement that the moral implications of an applicant's political conduct must be assessed in terms not only of contemporary but future community values. See *Schware* v. *Board of Bar Examiners, supra; Hallinan* v. *Committee of Bar Examiners, supra.* Even if the appellees could exclude subjectivity from their judgments, the task of making such a determination is overwhelming especially in the area of political activities, where community standards are inevitably in a state of constant change. But, in reality, the power to review the morality of another's political conduct is an open invitation to caprice and arbitrariness.

E. The Majority Below Erred in Refusing to Consider Appellees' Past, Long-Standing Practices

The majority erred in denying appellants' motion for an injunction against the statutes and judicial rules as applied through the questions, practices and regulations which were in effect at the time these suits were commenced but which ceased or were withdrawn before the court below rendered its decision. As Judge Motley correctly points out, these questions, practices and regulations only exemplified the scope of the appellees' investigatory-adjudicatory powers authorized by the challenged statutes and judicial rules;

> "[t]he net effect of these changes and deletions . . . is to leave unchanged the First and Fourteenth Amendment challenge to the statutes. 'The substance of the statutory and regulatory complex remains and from the outset . . . [plaintiffs'] basic claim has been that they are aggrieved by its application.' *Keyishian* v. *Board of Regents of State of New York,* 385 U.S. 589, 596, 87 S. Ct. 675, 680, 17 L. Ed. 629 (1967). See also, *Dombrowski* v. *Pfister,* 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)." (A. 178)

Furthermore, there has occurred merely a cessation by the appellees of their long standing practices. Appellees have not and, as long as the statutory-judicial scheme exists, cannot give affirmative assurances that such practices will not reoccur. This Court has held that these circumstances, particularly in the First Amendment area, present an insufficient basis for denying an injunction. See *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 515; *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632-633; *Gray* v. *Sanders*, 372 U.S. 368, 376; *Moore* v. *Ogilvie*, 394 U.S. 814; *Carroll* v. *President and Commissioners of Princess Anne County*, 393 U.S. 175; *United States* v. *Concentrated Phosphate Export Assn.*, 393 U.S. 199.

The history of application of the challenged statutes and judicial rules demonstrates that this complex scheme does not contain adequate standards to confine the cast of appellees' investigative net within constitutional boundaries. In effect, the apparent validity of these provisions on their face has been thoroughly undermined by their unconstitutionally sweeping application over a period of decades under the tacit, if not express, sanction of the New York Court of Appeals.

We believe that under these circumstances the statutory-judicial scheme should be treated as invalid on its face. An injunction should issue restraining the enforcement of the challenged statutes and judicial rules until they are revised expressly to provide for procedural safeguards and substantive limitations.

CONCLUSION

The judgment appealed from should be reversed to the extent it fails to grant all the relief requested.

Respectfully submitted,

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February 26, 1970

APPENDIX A

Statutes and Judicial Rules Involved

New York Civil Practice Law and Rules

Article 94—Admission to Practice

RULE 9401. Committee

The appellate division in each judicial department shall appoint a committee of not less than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state. Each member of such committee shall serve until his death, resignation or the appointment of his successor. A lawyer who has been or who shall be appointed a member of the committee for one district may be appointed a member of the committee for another district within the same department.

RULE 9404. Certificate of character and fitness

Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the committee and the appellate division justices, including specifically his present and such past places of actual residence as may be required by the committee and the appellate division, listing the street

and number, if any, and the period of time he resided at each place.

RULE 9406. Proof

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

1. that he believes in the form of the government of the United States and is loyal to such government;

2. that he is a citizen of the United States;

3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application for admission to practice; and

4. that he has complied with all the requirements of this rule and with all the requirements of the applicable statutes of this state, the applicable rules of the court of appeals and the applicable rules of the appellate division in which his application is pending, relating to the admission to practice as an attorney and counselor at law.

JUDICIARY LAW § 90(1)(a):

§ 90 Admission to and removal from practice by appellate division; character committees.

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall

have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

NEW YORK JUDICIARY LAW: Appendix:

Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law.

Rule VIII. Proof of Moral Character.
VIII-1. General Regulation.

Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.

VIII-2. Supporting Affidavits.

Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its Committee on Character and Fitness or otherwise.

Every applicant who pursued the study of law pursuant to these Rules must file with such Committee on Character and Fitness his certificate from the State Board of Law Examiners showing compliance with these Rules.

VIII-4. Discretion of Appellate Division.

The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper.

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